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GAMETE DONORS IN CANADA: IS ANONYMITY BEST?

by

Lisa Michelle Shields

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

Faculty of Law

Edmonton, Alberta

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University of Alberta

Faculty of Graduate Studies and Research

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ABSTRACT

The debate over donor anonymity raises contentious legal rights claims that cannot all be protected by one law. When such conflicts exist, fundamental legal principles ought to guide legislators in determining which rights to protect or, which interest claims should be made into legal rights. This thesis explores the principles used by the drafters of Bill C-13 in choosing to establish a legal right of donor anonymity. A critical analysis of the entrenchment of the right to donor anonymity identifies legal principles that are used to guide other situations that have relevant similarities to donor conception. The analysis shows that the principles used to support the establishment of a legal right of donor anonymity are applied incorrectly and without sufficient regard to overarching fundamental Canadian legal principles. A correct application of the relevant legal principles indicates that the right of donor offspring to know their genetic identities ought to be recognised by Bill C-13.

Dedication

This thesis is dedicated to Gair and Eamon, for their patient, optimistic support, noble sacrifices and continuing loving reminders about the really important things in life.

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Chapter 1 - INTRODUCTION

I. THE CONTEXT OF DONOR CONCEPTION

It has become evident that reproductive technologies are becoming increasingly commonplace. News abounds of cloned animals and babies, surrogate mothers and in vitro fertilisation mix-ups. Alongside the increase in the use and abilities of reproductive technologies is a debate about how and if we should regulate these practises. This debate is particularly heated because it involves issues that strike us as personal, ethical, spiritual or religious choices. Issues of birth, life, identity, and death are difficult to articulate, let alone to regulate by law. Nonetheless, unsavoury problems arise when there is no statutory scheme for reproductive technologies. Currently, Canada does not have a law in place that deals with reproductive technologies. The *Assisted Human Reproduction Act*[1] or Bill C-13, is a draft bill that would serve this purpose, if it is passed.

Therefore, many of the difficult issues that are found within the realm of reproductive technologies have not been addressed by Canadian law. One such issue is that of donor anonymity in donor-assisted conception. Most Canadian clinics have operated under policies of donor anonymity. Some clinics did not

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[1] *An Act respecting assisted human reproduction*, 2nd Sess. 37th Parl., 2002 (reinstating Bill C-56, 1st Sess..37th Parl.. 2002), on-line: <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-56/C-56_1/C-56TOCE.html > (date accessed 01 August 2003).

maintain records about the donors and the offspring the resulted from their donation. Because of these practices, most Canadians who were born through the use of donor gametes do not know the identity of their donor. Some such individuals, those who were conceived at clinics that have not maintained records, are unlikely to ever be able to determine the identity of their gamete donor.

If Bill C-13, as currently written, becomes law, a legal right of donor anonymity will be entrenched in Canada for the first time. The entrenchment of such a legal right signifies the prioritisation of a constructed right to privacy over more fundamental rights over one's own body.

The debate over donor anonymity raises many contentious legal rights claims that cannot all be protected by one law. When such conflicts exist, fundamental legal principles ought to guide legislators in determining which rights to protect or, which interest claims should be made into rights. This thesis explores the principles used by the drafters of Bill C-13 in choosing to establish a right of donor anonymity. A critical analysis of the entrenchment of the right to donor anonymity is carried out by identifying legal principles that are used to guide other situations that have relevant similarities to the donor conception context. The critical analysis shows that the principles used to support the establishment of a legal right of donor anonymity are applied incorrectly and without sufficient regard to overarching fundamental Canadian legal principles. A correct application of the relevant legal principles shows that the right of donor offspring to know their genetic identities ought to be recognised by Bill C-13.

II. TERMINOLOGY

This thesis will use the standard terms for parties and methods involved in donor conception. However, the author recognises and respects that every individual involved in donor conception has his or her own preferred term of identifying the relevant parties. Throughout, the term "donor" will refer to sperm, egg and embryo donors.[2] The individuals who access donor conception in an attempt to have a child are the "recipients."[3] The people who are created through the use of donor conception are "donor offspring." An "anonymous donor system" is one in which the recipients, donors and donor offspring do not automatically share identities among one another. An "identity-release system" allows donor offspring or potentially recipients to obtain identifying information about their donor.[4]

The phrase "donor conception" refers to all methods of conception that involve the use of donated gametes or embryos. The most common type of donor conception is "donor insemination" or DI. DI is typically used when there is an issue of male infertility; however, it is also used by women who wish to conceive without a male partner.[5] DI can involve the insemination of a woman by

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[2] The overwhelming majority of data on donor conception has come from the context of donor insemination, or the use of donor sperm. When a particular analysis is relevant only to sperm donors, the author will specify this. In all other instances of the term "sperm donor" the reader may presume that the point being made is applicable to all donor situations.

[3] Recipients are often thought of as the "social parents" of the individuals who are conceived through the use of donor conception procedures.

[4] The specific characteristics of an identity-release system range from permitting only the donor offspring to request identifying information about the donor to allowing any of the three parties to access identifying information about the other party. An "open donation system" would include the sharing of identities between recipients and donors at the time of the procedure.

[5] Some jurisdictions, both inside and outside Canada, do not provide donor conception services to single women or lesbians. Some donors choose to donate with the condition that their gametes or

placement of donor sperm directly into her uterus. Donor sperm can also be used during in vitro fertilisation (IVF) in which case the woman's eggs would be retrieved from her ovaries and then fertilised by the donor sperm.

Donor eggs can be used in situations of female infertility. If a couple chooses to attempt conception with the use of donor eggs and there is no issue of male infertility, the sperm of the male partner will often be obtained and used to fertilise the egg through in vitro fertilisation. The fertilised donor egg then is implanted into the recipient's womb for pregnancy. Donor sperm can also be used in this process.

Some individuals who have been involved with fertility treatments may end up with "extra" embryos that have been created through their treatments. These embryos may be donated for implantation into another woman's uterus. In this case, any child that results will have no genetic link to the recipients or social parents.

III. DONOR CONCEPTION PROCEDURES IN CANADA

The use of donor eggs is far less common than the use of donor sperm. Egg donors must undergo extensive treatment to prepare for egg collection. Some

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embryos will not be used by single women or lesbians. See, for example, Infertility Network (Toronto, Ontario), "Donor Conception," (17 July 2002); M. Booth "Lesbian Access to Donor Insemination" (1995) 63:3 *The Social Worker*; K.R. Daniels & I. Burn "Access to Assisted Human Reproduction Services by Minority Groups" (1997) 1:79 *New Zealand Journal of Obstetrics and Gynaecology* 79; R. McLean, "Sperm Donor Shortage Alarms New Zealand Lesbians" *Sunday Star-Times* (25 November 2002), on-line: <http://www.maltagayrights.com/news/archive_international/may02/Sperm_Donor_Shortage> (date accessed 26 November 2002); and C.Newton *et.al.* "Embryo donation: attitudes toward donation procedures and factors prediction willingness to donate" (April 2003) 18:4 *Human Reproduction* 878.

physicians even feel that egg donation poses a health risk to the donors.[6] Canadians who want to use an anonymous egg donor may wait for one to two years.[7] In order to avoid such a lengthy delay, some potential recipients seek the assistance of a known donor. The known donor may be an acquaintance or relative, or could be an individual who was contacted through the use of an advertisement.[8]

In Canada, donor conception services are currently offered through both private clinics and hospital facilities.[9] Most people who wish to access these services will have to pay for them out of their own pockets. Most provincial and private health insurance programs do not cover the costs of donor conception.[10] In fact, Ontario is currently the only province whose health insurance plan covers any in vitro fertilisation treatment.[11] The costs of the procedures vary. Each donor egg cycle costs between $20,000 and $25,000.[12] The approximate cost for one donor insemination cycle is between $1,000 and $3,000.[13] Several cycles or attempts may be necessary. The Canadian Fertility & Andrology Society's most recent statistics indicate an overall live birth rate of 20% for each cycle.[14]

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[6] J. Revill, "IVF egg donors 'risking their health'" *Observer* (9 February 2003), on-line: <http://observer.guardian.co.uk/uk_news/story/0,6903,892004,00.html> (date accessed: 1 August 2003).

[7] Infertility Network, *supra* note 5 at 1.

[8] Infertility Network, *supra* note 5 at 1.

[9] Not all hospitals in Canada offer these services. For a comprehensive list of fertility clinics in Canada, see Infertility Network (Toronto, Ontario), "Fertility Clinics in Canada" (11 November 2002).

[10] Infertility Network (Toronto, Ontario), "Doctors, Clinics & Costs" (24 October 2002) at 3-4.

[11] *Ibid.* at 4.

[12] Infertility Network, *supra* note 5 at 2.

[13] Infertility Network, *supra* note 5 at 2.

[14] As reported by the Infertility Network, *supra* note 5 at 1. The website for the Canadian Fertility & Andrology Society is: www.cfas.ca.

Canadian sperm donors are currently paid on average between $20 and $40 per sample,[15] although one report from 1996 estimates that donors are paid as much as $75.[16] There are numerous reports of egg donors around the world being paid large sums of money, especially if the donors meet select criteria. The Canadian clinics that offer egg donation services pay approximately $3000 per egg.[17] There have been no statutory limits placed upon the number of donations an individual could make or on the number of offspring that can be created through any one person's donations. Thus, each clinic will have its own policies on these standards.

IV. CANADIAN REGULATIONS AND STANDARDS FOR DONOR INSEMINATION

Canadian clinics are now required to screen potential sperm donors for sexually transmitted diseases according to the requirements articulated in the *Processing and Distribution of Semen for Assisted Conception Regulations* (hereinafter the "*Semen Regulation*").[18] There is no similar law for the collection and testing of donor ovum. The *Semen Regulation* also requires clinics to keep records of the distribution of semen[19] and discontinue use of any semen that is found to carry an infectious disease.[20] A few years after the original regulation came into force, in March 2000, Health Canada imposed stricter requirements on

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[15] E. Moyle, "Canada short on sperm!" *Canoe* (29 March 2001), on-line: <http://www.canoe.ca/LifewiseHeartLove01/0329_sperm_sun.html> (date accessed: 01 August 2003).
[16] K.Johnson , "Unethical payment or reasonable compensation? Money for eggs, sperm" *Infertility Helper* (March 1996).
[17] S. McLelland "Who's My Birth Father?" *Maclean's* (20 May 2002) 20 at 22.
[18] *Processing and Distribution of Semen for Assisted Conception Regulations*, S.O.R. 96-254.
[19] *Ibid.* at ss. 12-13.
[20] *Supra* note 18 at ss. 14-18.

the testing of semen which were established in the form of a "Directive."[21] The new standards were implemented after a woman contracted chlamydia from donated sperm.[22] In regard to the new guidelines, Health Canada stated that its investigations in 1999 concluded that some semen banks were non-compliant with the regulations.[23] It found in particular that tests for the detection of hepatitis B, hepatitis C, HTLV I/II, HIV-II, CMV, chlamydia, neisseria, gonorrhoea, ureaplasma urealyticum and mycoplasma hominis were "not performed or not routinely performed." [24] The guidelines were retroactive, and faced with the task of contacting and testing all donors whose samples were banked, 47 of Canada's approximately 57 labs closed.[25] Follow-up investigations conducted by Health Canada one year after the introduction of the new guidelines found that several clinics still did not follow the standards for record-keeping and disease testing as established in the regulations.[26] The investigators found that only 10% of the sperm banks were in compliance with the regulations.[27]

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[21] Health Canada, "Health Canada Directive: Technical Requirements for Therapeutic Donor Insemination" (July 2000) Health Canada Online, on-line: <http://www.hc-sc.gc.ca/hpb-dgps/therapeut/zfiles/bgtd/semendirective_e.html> (date accessed: 01 August 2003).

[22] *Supra* note 15. A decade before, a woman in Vancouver contracted the AIDS virus from donor sperm and the physician involved was found negligent (December of 1991). See L. Kinross "Breaking the silence on Donor Insemination" *Toronto Star* (25 July 1992).

[23] Health Canada, "Questions and answers in relation to semen banks/ clinics" (July 1999), Health Canada Online, on-line: <http://www.hc-sc.gc.ca/English/media/releases/1999/9990cbk3.htm> (date accessed: 01 August 2003).

[24] *Ibid.*

[25] *Supra* note 15.

[26] A. Macintosh, "Sperm banks in breach of federal regulations inspectors' finding: Reports cite shoddy paperwork, failure to screen semen for disease" *National Post* (20 December 2002), on-line: <http://www.cfas.ca/English/broadcast/2002/2002_dec20b.asp> (date accessed: 1 August 2003).

[27] *Ibid.*

The new standards, along with the declining number of donors, have been blamed for leading to a shortage of Canadian sperm donors.[28] The director of one Canadian clinic reports that 90% of potential sperm donors are rejected due to a combination of these two factors.[29] In order to deal with this shortage, Canadians have been obtaining American donor sperm.[30] Any semen imported into Canada must meet Canadian testing requirements.

V. CURRENT CANADIAN PRACTISES REGARDING DONOR ANONYMITY

Although the law provides some level of guidance regarding the processing of semen, it has not directly addressed the issue of donor anonymity. It has not even addressed the process for ovum and embryo donation in any legislative manner. The *Semen Regulation* and the Directive are narrowly tailored to deal mostly with testing for infectious diseases and as such, fertility clinics are left on their own to create most policies relating to donors. While the new standards include a section on the criteria for the exclusion of potential donors, the criteria are almost all based on the probability of the potential donor harbouring an infectious disease. The only exceptions to this are that employees or family members of employees of the clinic are excluded as well as men over 40 years old.[31]

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[28] *Supra* note 15.
[29] *Supra* note 15.
[30] B. Wolf , "A Uniquely American Export is Becoming Popular Overseas" *ABC News* (2000), on-line: <http://www.abcnews.go.com/sections/us/WolfFiles/wolffiles139.html> (date accessed 01 August 2003).
[31] *Supra* note 18.

According to the Directive, Potential donors must undergo a physical medical examination and provide a medical history.[32] However, there is no requirement for testing for inheritable diseases or conditions. Reliance is placed upon the potential donor to be forthright and knowledgeable about his medical history. Additionally, the *Semen Regulation* and the Directive are silent on which inheritable disease or conditions, if any, should disqualify a potential donor.

If a potential donor is accepted, the Directive indicates that the clinic should keep documentation of the donor's name, address, date of birth, medical information and test results.[33] There is no provision for a recipient or donor offspring to request any of the donor information that clinics are required to maintain. There is also no mention about what information about donors should be provided to potential recipients. Thus, the question of donor anonymity has not been addressed in the laws. Although the Directive is important in that it identifies a standard in record-keeping, it is clear that most clinics are not complying with its guidelines.[34]

The Directive states that the "semen bank or fertility clinic shall be responsible for ensuring donor confidentiality."[35] This is a general measure regarding confidentiality, not a statement about confidentiality of the donor in regards to the recipient or donor offspring. Furthermore, the *Semen Regulation* is unclear as to whether or not records must be kept of which donor's sperm was used to inseminate each particular patient. The portion of the *Semen Regulation*

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[32] *Supra* note 18 at s.3.3.2 (c).
[33] *Supra* note 18 at s. 3.4.
[34] *Supra* note 26.
[35] *Supra* note 18 at s. 3.3.2.(e).

that deals with recording information about the patient who receives donor insemination does not stipulate that the records must indicate which donor's semen was used in that procedure.[36] In this way, the reference to "confidentiality" in the Directive cannot be taken as anything more than a general procedural guideline for the processing of the semen. It is not indicative of a statement about donor anonymity.

Thus, clinics in Canada are left to develop their own policies on donor anonymity. Generally, Canadian clinics have not provided identifiable donor services. Furthermore, Canadian clinics have not typically discussed with potential donors the option of being identifiable. Thus most Canadian donors have donated with the understanding that they would remain anonymous, given that the possibilities of identity-release were not raised at the time of donation. Therefore although most, if not all, Canadian donors to date have donated anonymously, it cannot be concluded that this was an informed choice. More importantly, conclusions cannot be drawn about the importance of anonymity to Canadian donors based on the lack of information and options provided to them.

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[36] *Supra* note 18 at s. 13(d).

Chapter 2 - BILL C-13

I. CONTENTS OF Bill C-13

Section 18(3) of Bill C-13 establishes the right of donors to withhold identifying information from recipients and donor offspring. If a recipient or donor offspring requests identifying information about the donor, it will only be provided with the donor's written consent. The identity of the donors, recipients and procedures is passed from the clinics to the Assisted Human Reproduction Agency of Canada ("the Agency") which will maintain the information in a "personal health information registry."[37] The Agency is a body established under Bill C-13 in order to retain and control the use of assisted human reproduction information.

Some non-identifying information about the donor would be available to the recipients and donor offspring. This includes the donor's genetic information and medical history.[38] Bill C-13 refers to this information as "health reporting information." Non-identifying health reporting information includes the donor's age, race, some physical characteristics and known medical history. Before performing any donor conception procedure, the donor's health reporting information shall be shared with the recipients.[39]

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[37] *Supra* note 1 at ss. 17 and 21(1).
[38] *Supra* note 1 at s. 18(2).
[39] *Supra* note 1 at s. 15(4).

Although the health reporting information is collected from the donor prior to his or her donation, there is no requirement that the donor provide the Agency with any updates should any new information come to light. This means that if the donor becomes aware of a serious genetic illness in his or her family or self after donation, the donor offspring and recipients may not be informed. The health reporting information is further limited by the kind of information that can be obtained in the medical examination and any testing that may be done. Although there may be some tests to determine if the donor is a carrier of any hereditary illnesses, medicine cannot identify the presence of all possible diseases. Moreover, many kinds of illnesses only appear in an individual later on in life. The donor may develop illnesses that the recipients or offspring might consider relevant after the donor has provided the clinic with his or her health reporting information.[40]

Bill C-13 will eliminate all payments to donors, except for reimbursement for expenditures incurred by the donors in the course of donating.[41] It will also prohibit the sale or purchase of gametes and embryos.[42] Thus, private advertisements seeking donors and offering payment will no longer be legally permissible. Additionally, there are no parameters under Bill C-13 for parties to make private contracts, such as an open-donor contract, given that obtaining,

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[40] One particularly striking example of a donor only showing signs of a serious hereditary illness is that of a Dutch sperm donor. The man donated sperm from 1989 until 1995, but was diagnosed with cerebellar ataxia, a serious degenerative disease in 1998. The 18 children who were conceived through the man's donated sperm each have a 50% chance of inheriting the illness. When he became aware of his illness, the man told the hospital that performed the donor services. After three years of deliberation, the hospital decided to inform the families of the donor offspring. See "Prolific Sperm Donor's Bad Gene" *Wired News* (27 February 2002), on-line: <http://www.wired.com/news/medtech/0,1286,50703,00.html> (date accessed: 01 August 2003).

[41] *Supra* note 1 at s. 13.

[42] *Supra* note 1 at s. 7.

storing and transferring gametes and embryos can only be done by a licensed facility.[43]

Bill C-13 requires licensed facilities that obtain donor gametes or embryos to provide potential donors with counselling services.[44] The extent of these services will be determined by the relevant regulations, when they are entrenched. Although it is evident that any recipient would have to provide informed consent to the donor conception procedure, there is a specific provision in Bill C-13 that the written consent of the donor is obtained prior to obtaining the donation.[45]

There is no requirement for recipients to inform their children about the use of a donor in their conception. Without this knowledge, donor offspring cannot determine whether or not they want to apply to the Agency for information about their donor. Ironically, if recipients choose to tell their children about their use of donor conception, Bill C-13 does not stipulate a minimum age which must be attained by donor offspring before they can apply to obtain identifying information about their donor. The implications of Bill C-13's silence on these issues will be discussed further in the analyses of the views of recipients and donor offspring.

II. HISTORY OF BILL C-13

A. Royal Commission

Bill C-13 is the result of nearly 15 years of government research and debate as well as consultation with the public and stakeholders. In 1989 the

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[43] *Supra* note 1 at s. 10
[44] *Supra* note 1 at s. 14(b).
[45] *Supra* note 1 at s. 14(c).

Royal Commission on New Reproductive Technologies was created with a view to providing important information to be used in drafting Canada's first reproductive technology law. The Commission consulted with approximately 40,000 interested individuals and organizations.[46] The Report produced by The Royal Commission in 1993, "Proceed With Care," contained several recommendations for the government.[47]

The Commission's overall perspectives were developed using an "ethic of care."[48] The Commission identified eight principles to assist with ensuring that the ethic of care was reflected in their decisions. These principles are: individual autonomy, equality, respect for human life and dignity, protection of the vulnerable, accountability, non-commercialization of reproduction, appropriate use of resources, and balancing individual and collective interests.[49]

The Commission recognised the importance of knowing one's genetic origins: "Although adoptive and DI families are different, the experience of adoptees can suggest what DI children need with regard to access to information about their social and genetic background."[50] Furthermore, the Commission accepted that comprehensive record-keeping is in keeping with the best interests

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[46] A. Ali and O. Wood "Reproductive technologies laws in Canada" *CBC News Online* (9 May 2002), on-line: < http://www.cbc.ca/news/indepth/background/rgtech_parttwo.html> (date accessed: 28 February 2003).

[47] *Proceed With Care*, Final Report of the Royal Commission on New Reproductive Technologies, (Ottawa: Canada Communications Group, 1993).

[48] In *Proceed With Care*, the Commission defined the ethic of care as:

> ...moral wisdom and sensitivity...in focussing on how our interests are often independent. And moral reasoning involves trying to find creative solutions that can remove or reduce conflict, rather than simply subordinating one person's interests to another. The priority, therefore, is on helping human relationships flourish by seeking to foster the dignity of the individual and the welfare of the community.

In *Proceed With Care*, *Ibid.* at 52 (vol. 1).

[49] *Supra* note 47 at 53-58 (vol. 1).

[50] *Supra* note 47 at 468.

of the child. The Commission concluded that the goals of maintaining adoptive records are for the best interests of the adopted child and that similar goals should be established in the donor conception context.[51]

Despite these conclusions, the Commission recommended that an anonymous donor system be established in law. The Commission further recommended that non-identifying information about donors be available to parents and donor offspring but that identifying information only be disclosed in extraordinary circumstances of medical need with the permission of a court.[52] The Commission wanted to create a system in which recipients would be able to create an environment in which priority is given to "family relationships and actual parenting" rather than to genetic links.[53]

Although the Commission recommended that a standard amount of information on the decision to tell one's child about the use of a donor must be provided to recipients, it concluded that it is the right of the parents (recipients) to decide whether or not to tell their children.[54] The Commission therefore recommended that there be no requirement upon recipients to tell their children that they are donor offspring.[55] Consequently, the system recommended by the Commission would permit donor offspring to access non-identifying information about their donor only if their recipient parents chose to tell them about the nature of their conception.[56]

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[51] Supra note 47 at 469 (Vol. 1).
[52] *Supra* note 47 at 446 and 481-484 (Vol. 1).
[53] *Supra* note 47 at 445-446 (Vol. 1).
[54] *Supra* note 47 at 465 (Vol. 1).
[55] *Supra* note 47 at 465 (Vol. 1).
[56] *Supra* note 47 at 445 and 465 (Vol. 1).

The Commission's report led the government to implement a voluntary moratorium on issues such as sex selection and the sale and purchase of gametes and embryos, but the resultant statute, the *Human Reproductive and Genetic Technologies Act* did not become law. Thus, the anonymous donor system was not entrenched at that time nor were any universal standards of practice adopted.

B. Standing Committee

After the *Human Reproductive and Genetic Technologies Act* failed to become law in 1997, Health Canada began preparations to create a new assisted human reproduction statute.[57] The new draft legislation was presented to the House of Commons Standing Committee on Health on May 3, 2001.[58] The Standing Committee was asked to provide feedback on the new draft bill. In order to do that, the Standing Committee received presentations from numerous stakeholders on assisted human reproduction issues.

Nearly nine years after the Commission presented its report the Standing Committee concluded its processes and presented its recommendations on the new draft legislation, the *Assisted Human Reproduction Act*. In contrast with the Commission, the Standing Committee recommended a system in which adult donor offspring would have the right to know the identity of their donors.[59] The scale may have been tipped by the Standing Committee's conclusion that "children conceived through assisted human reproduction warrant even greater

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[57] *Supra* note 47.
[58] *Supra* note 47.
[59] Standing Committee on Health, "Building Families," Recommendation 19 at 18-20, on-line: <http://www.parl.gc.ca/InfoComDoc/37/1/HEAL/Studies/Reports/healrp01/08-rap-e.htm> (date accessed: 01 August 2003).

consideration than the adults seeking to build families..."[60] The Committee further stated that assisted human reproduction "impinges on society's sense of uniqueness, worthiness and wholeness associated with being human."[61] Because of this, the Standing Committee concluded that there "must be a measure of respect and protection for the embryo that is based on its potential for personhood."[62]

These principles led the Standing Committee to conclude that the anonymous donor system relies upon secrecy that necessarily treats the children as commodities negotiated between the recipients, donors and clinicians.[63] Prospective donors should be fully educated as to the nature of their donation and should only be accepted if they consent to the release of their identity to donor offspring.[64] According to the Standing Committee, the rights of donor offspring should take precedence over the donors' rights to privacy if the two should conflict.[65]

The Committee was concerned that almost none of the sperm banks in Canada retain detailed information about donors and about any offspring that have resulted from the donations.[66] The Committee noted that this information is critical for the appropriate development of the regulation of assisted human regulation. In a similar vein, the Committee noted that physicians and others who are involved with the provision of assisted human reproduction services be

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[60] *Ibid.* at s. 2(A).
[61] *Supra* note 59 at s. 2(B).
[62] *Supra* note 59 at s. 2(B).
[63] *Supra* note 59 at s. 8(2).
[64] *Supra* note 59 at s. 8(ii).
[65] *Supra* note 59 at s. 8(ii).
[66] *Supra* note 59 at s. 8(i).

provided should be provided with education on the importance of moving away from the current reliance on secrecy in anonymous donations.[67]

Health Canada publications have termed the Bill C-13 system as "mandatory donor identification" and explained that: "the identity of the donor would only be disclosed with the written consent of the donor."[68] Whereas the Committee felt that its system paralleled adoption law, Health Canada states that the Bill C-13 scheme "is similar to the system which provincial and territorial governments have implemented in the field of adoption."[69] This is the official and only reason given by Health Canada for the decision to go against the Committee's recommendations against donor anonymity.

However, in response to questions of why the draft legislation did not create an identifiable donor system, then Health Minister Allan Rock stated: "We feel that if we did that it would be a significant deterrent to people actually donating sperm for the purpose of reproduction."[70] Given the current shortage of donor sperm in Canada,[71] any further deterrence would lead to an even greater strain on the already short supply. The current health minister, Anne McLellan echoed Allan Rock's justifications in a more recent speech on Bill C-13. McLellan pointed out that Bill C-13 does not allow for anonymous donors given

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[67] *Supra* note 59 at s. 8(ii).

[68] Health Canada, "Proposed Act Respecting Assisted Human Reproduction – Frequently Asked Questions" (May 2002) Health Canada Online number 5, on-line: < http://www.hc-sc.gc.ca/english/media/releases/2002/2002_34bk2.htm> (date accessed: 01 August 2003).

[69] *Ibid.* at number 5.

[70] D. Bueckert, "Donor-insemination offspring want right to know genetic roots", *C-Health*, (25 May 2001), on-line: < http://www.canoe.ca/Health0105/25_di-cp.html > (date accessed 01 August 2003).

[71] There has been a "shortage" of Canadian sperm donors since Health Canada implemented more stringent guidelines (March 2001) on donor testing following a situation where a sperm donor recipient contracted chlamydia through the donated sperm. Most of the donor sperm being used by Canadian clinics now comes from the United States. See: Moyle, *supra* note 15 and Wolf, *supra* note 30.

that "[a]ll donors will have to provide their names to clinics before they can donate."[72] McLellan went on to say that requiring donors' consent for the release of their identifying information is "similar to that used by the provinces and territories for adopted children."[73]

The discourse on the conflict between donor offspring's desire to know their genetic heritage and donors' desire to remain anonymous is cloaked in terms of privacy rights. The government makes general allusions to the privacy rights of donors as support for the anonymity system; however it does not specifically illustrate the link between privacy rights or privacy legislation and the necessity to construct an anonymous donor system.[74]

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[72] The Hon. A. McLellan, "Speaking Notes for the Honourable A.Anne McLellan, Minister of Health at the Second Reading Debate on Bill C-56 *An Act Respecting Assisted Human Reproduction*," Ottawa (21 May 2002) Health Canada Online at 4, on-line: < http://www.hc-sc.gc.ca/english/media/speeches/23may2002mine.html > (date accessed: 01 August 2003).
[73] *Ibid.*
[74] Health Canada, "Feedback Report-Discussions and Written Comments on Proposed Federal RGTs Legislation" , (June 2000) Health Canada Online, on-line at: < http://www.hc-sc.gc.ca/english/protection/reproduction/rgt/feedback_report.htm> (date accessed: 01 August 2003).

Chapter 3 - VIEWS OF PARTIES INVOLVED IN DONOR CONCEPTION

I. DONORS

A. Anonymity

Although Bill C-13 attempts to protect the supply of donors by assuring anonymity, it is a myth that donors will only donate on condition of anonymity. A critical study conducted in Australia discovered that 97% of donors interviewed would agree to contact with the donor offspring.[75] A California sperm bank that offers donors the option of being anonymous or known found that 75% of their donors chose to be identifiable.[76] One British sperm donor interviewed by the BBC and who donated under the current U.K. legislation where anonymity is guaranteed has stated that he would have "no problem at all with giving up [his] anonymity."[77]

To further illustrate this point there is also the Swedish experience. After the Swedish law was changed to abolish anonymous donors there was a short-term decrease in the number of donors.[78] The numbers were restored to previous levels with a notable change in the demographic of donors. After the change in

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[75] V. Adair, "Redefining Family: issues in parenting assisted by reproduction technology" ("Changing families, challenging futures" 6th Australian Institute of Family Studies Conference, The University of Auckland. 25-27 May 1990), on-line: <http://www.aifs.gov.au/institute/afrc6papers/adair.html > (date accessed: 01 August 2003).

[76] B. Stevens, "Offspring," *CBC Witness* (10 October 2001), on-line: <http://www.cbc.ca/programs/sites/features/offspring/index.htm> (date accessed: 01 August 2003).

[77] "I'd happily be identified" *BBC News (Health)* (16 May 2002), on-line: <http://news.bbc.co.uk/2/hi/health/1991225.stm> (date accessed: 01 August 2003).

[78] R.G. Lee and D. Morgan, *Human Fertilisation & Embryology*. (London: Blackstone Press Limited, 2001) at 232.

legislation donors tended to be older, married men who identified their primary motivation for donating as wanting to help others to have their own families.[79] Therefore, the efficacy of Bill C-13 in procuring donors by way of ensuring anonymity appears misguided at best.

B. Motivation for Donating

In Canada, sperm donors are currently paid very little. If Bill C-13 becomes law, donors will only be reimbursed for expenses incurred while donating, such as parking costs.[80] Thus, in Canada, financial gain is generally not considered to be a motivation for donors. Other countries, like the United States, provide varying amounts of payment to the donor. Some donors can be paid a sizeable sum, such that payment may be a motivating factor for donors. Nonetheless, financial gain has been little incentive for Canadian donors and will be further reduced by Bill C-13.

It is also a possibility that some men are motivated by a desire to create as many children with his genes as possible. There are no limits in Bill C-13 on the number of times a person can donate. Although the donating of ovum is time-consuming, difficult and complicated, donating sperm is relatively quick and easy. Additionally, one sperm donation can allow for the conception of hundreds of children. Therefore, it is possible that hundreds of offspring could result from one donor. In Canada since there have been no requirements for clinics to maintain records of such things, it is not known how many offspring have resulted from each donor. To get an idea of the number of offspring that can result from

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[79] *Ibid.* at 232.
[80] *Supra* note 1 at s. 12(1)(a).

one donor, one can look at the situations when problems have arisen with a donor's sample. This has occurred in Holland with the post-donation discovery of a serious genetic problem. Although the donor had been screened in accordance with typical guidelines, he was discovered to have a rare, untreatable, hereditary degenerative brain disorder and had 'fathered' 18 offspring through his sperm donation.[81] Thus, the desire to propagate oneself many times over can also be a motivating factor of donors.

Similarly, a general feeling of 'genetic superiority' can also be a motivating factor that may be linked with the multi-propagation drive. One American sperm donor gave his reason for donating as the following: "I realize the people applying for sperm have gone through a great deal of thought about having a child and deserve the best gene pool possible, and as a healthy, athletic young male, I believe I can help."[82] Thus, if individuals feel that they carry sufficiently desirable genetic traits, they may feel that donating their gametes is a good thing for them to do.

What is interesting is that there is a great deal of discussion over the 'privacy rights' of the donors and their lack of fiduciary feelings to any offspring that may be created by their genetic material. Nonetheless, it has been found that donors or potential donors may feel that they should have a role in deciding who can and cannot use their gametes or embryos when given this choice. For example, in New Zealand, the vast majority of sperm donors stipulate that they

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[81] *Supra* note 40.

[82] Human Rights Campaign Foundation, "Choosing an unknown donor" FamilyNet, on-line: <http://www.hrc.org/familynet/chapter.asp?article=33> (date accessed: 01 August 2003).

will not allow their sperm to be used by a lesbian or lesbian couple.[83] The New Zealand clinics allow sperm donors to stipulate such information as part of the donor process. Bill C-13 does not address the issue of whether a donor can make such stipulations, although given that it does not limit such a process, it may be the case that clinics will also permit donors this freedom.

Generally, the dominant theory is that donors are motivated for altruistic reasons.[84] Thus, although there may be other reasons for donating, it seems to be acceptable to conclude that most donors are at least partially interesting in helping others have their own children. Altruism must necessarily be a large factor in donor schemes that do not provide reimbursement, such as in Bill C-13.

II. DONOR OFFSPRING

A. General Feelings about Anonymous Donor Conception

Donor offspring have expressed a need to know their genetic heritage. For them, this includes knowing the identity of their donor. In Canada "thousands of people born after donor insemination have campaigned for a tracking system."[85] A group of sperm donor offspring presented a brief to the House of Common Standing Committee on Health illustrating the pain, confusion and psychological torment that they have suffered as a result of their inability to find their biological fathers. This information likely contributed to the Standing Committee's recommendation to implement an open donor system.

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[83] R. McLean, *supra* note 5.
[84] *Supra* note 75.
[85] "Bill Lays out reproductive technology rules" *CBC News* (09 May 2002), on-line: <http://www.cbc.ca/stories/2002/05/09reprotech_020509 > (date accessed: 01 November 2002).

Donor offspring who feel this deep need to know their genetic identities may struggle to articulate why knowing their donor is so important when they already have parents (or a parent, in the case of a single-parent) and a family. They may be criticised by others for hurting their social family by placing a value on the donor.[86] Some people may think that the donor offspring should be grateful to have been born at all and as such should simply be happy enough to not want to seek any additional genetic information.[87] This can be seen as a rejection of the social family.

Similarly, some donor offspring have been criticised for making genetics more important than social bonds. This is a misplaced criticism, given that in the case of gamete donor conception, it is the recipients who were motivated by a need for creating a child with as much of their own genetic material as possible. In Canadian society, it is considered normal and healthy to want a child who shares one's genes. In fact, this desire is encouraged not only generally in society, but also in the myriad of reproductive technologies available to individuals who will go to great lengths to have the chance at having a child who shares one of the social parents' genes.

The desire to have a child who has as much of a genetic link to oneself and his or her partner was acknowledged by Health Minister Anne McLellan in a speech on Bill C-13. She stated: "the Bill before us speaks to the most fundamental human desire – having a family…approximately one in eight

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[86] United Kingdom Department of Health, "Donor Information Consultation: Providing Information About Gamete or Embryo Donors" (20 December 2001) at number 17, on-line: < http://www.doh.gov.uk/gametedonors/document.htm> (date accessed 01 August 2003).
[87] C. Norton, "'Faceless fathers' may be identified" (24 April 2000) *The Independent [London]*, on-line: <http://news.independent.co.uk/uk/this_britain/story.jsp?story=7133).

Canadian couples faces the challenges of infertility. The Bill seeks to provide a measure of comfort and protection through various means."[88] Thus, if having a child with as great of a genetic link to the parents as possible is a fundamental desire that Canadians wish to support and encourage, there should be recognition for the correlative desire in offspring: to know their own genetic background.

In general, the experiences of the donor offspring who have spoken out reveal some common themes: (i) a lack of the ability to form an identity, (ii) a nagging feeling of difference or not belonging, (iii) the absence of an important part of oneself, (iv) the feeling as a child that something was not right in the family, (v) anger towards the family and state for choosing and allowing deception against them and (vi) the ability to know one's genetic parents is a fundamental right that offspring have been wrongly denied.

i. Identity

Donor offspring report that they are unable to form a secure identity. They feel that being able to know the identity of the donor would allow a critical piece of their self to be uncovered. A study by the University of Surrey has analysed the feelings of adults born through the use of donor sperm. Among other things, it concluded that the identity of the participants was "threatened" by the use of anonymous donors.[89] The Canadian Government noted that research "has demonstrated the harmful effect of denying access to a "vertical personal

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[88] *Supra* note 72.

[89] "'Shock' of sperm donor babies" *BBC News (Health)* (31 July 2000), on-line: <http://news.bbc.co.uk/2/hi/health/903564.stm> (date accessed: 01 August 2003).

identity.""[90] Additionally, in a presentation to the House of Commons on the issue of donor anonymity, Member of Parliament Rob Merrifield cited a critical portion of the textbook "Bioethics in Canada:"

> One's genetic history links one to a network of persons. Grandparents, great-grandparents, and the collateral relationships of uncles, aunts, cousins, are integral strands in the pattern of human connections essential to one's sense of personal identity. One may experience a very shallow sense of identity, if one's social identity rests upon no identifiable underlying grid or network of connections to one's genetic ancestors and relations.[91]

The importance of knowing one's genetic heritage has been expressed by one British donor offspring in this way:

> We ourselves embody a narrative. Sperm is not just fertilizer: it is a book, in which is written half the recipe for a new human being. When my donor's sperm fertilized my mother's egg he ensured that his genes were passed on to me. Most people would accept that an individual's personal development is the story of the interaction of genetic predisposition with environment. Each of us owns our personal history. Not just the funny things we said when we were little, but the darker and half-hidden story in the genes, the story which we cannot read but whose narrative will inescapably unfold in our own lifetimes and be passed to our own children.[92]

One Australian woman, Joanna Rose, is bringing an action in the British High Court to obtain information on the identity of the sperm donor used in her

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[90] *Supra* note 74.

[91] R. Merrifield, M.P., Speech to the House of Commons (37th Parliament, 1st Session), Edited Hansard Number 188 (May 21, 2002), on-line <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/188_2002-05-21/han188_1030-E.htm#Int-239225> (date accessed: 01 August 2003) and D. Roy, J. Williams & B. Dickens. *Bioethics in Canada* (Scarborough: Prentice Hall, 1994).

[92] D. Gollancz, "Give me my own history" *The Guardian Unlimited* (20 May 2002), on-line: <http://society.guardian.co.uk/Print/0,3858,4416955,00.html > (date accessed 01 December 2002).

conception.[93] Rose argues that she and her half-brother "have suffered an identity crisis from knowing nothing about their biological father."[94]

Joanna Rose has argued that the information is necessary for her to "attempt to resolve her feelings of incompleteness, anger, frustration and hurt."[95] A British adolescent conceived through the use of donor sperm has stated that she is grateful to the man who "gave her life" and gave her parents "great joy."[96] Nonetheless, she noted that she could not "feel complete without knowing" his identity.[97]

In some ways, the lack of a secure identity can strike at the heart of one's existence. We exist in a collective, a society, and as such, our relations with others assist us in determining our place, or our belonging, in that society. One donor offspring stated that her parents' denial of the importance of her genetic origins led her to feel that "in some way [her] parents were denying [her] existence."[98]

ii. Not Belonging

Donor offspring are frustrated at not being able to know their genetic parents as most other people can. They feel like they are somehow different from others. One 46 year-old donor offspring expressed her feelings in this way: "[m]y

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[93] "Plea from sperm donor children" *BBC News (Health)* (22 May 2002), on-line: <http://news.bbc.co.uk/2/hi/health/1999784.stm> (date accessed 01 August 2003).
[94] M. Braid "Your Daddy was a donor" *The Observer* (20 January 2002), on-line <http://www.observer.co.uk/review/story/0,6903,636020,00.html> (date accessed: 01 August 2003).
[95] *Supra* note 93.
[96] *Supra* note 94.
[97] *Supra* note 94.
[98] A. Turner, "My Story" (Spring 1999) *DI Network news* (published by Donor Conception Network, P.O. Box 7421 Nottingham, U.K., NG3 6ZR) at 5, on-line at <http://www.dcnetwork.org>.

parents never even met....I still feel like a freak, a fake. I don't feel I know who I am any more."[99] The University of Surrey study also found that many of the offspring felt "unwanted."[100] It also found that offspring had pain at characterizing their conception as a cold, scientific procedure rather than the result of the union of two people. This feeling was also expressed by a British woman who said that:

> I was 40 when I found out that my father was a glass jar with a blob of sperm in it. My father doesn't have a face, or a name and he wasn't even a one-night stand. If my mum had had an affair at least there would have been sex and lust, something human rather than something so cold, scientific and clinical.[101]

Another woman said that she found out that a donor was used when she expressed to her mother about an "overwhelming feeling of wanting to belong" and her mother correctly attributed this feeling to the secret nature of her daughter's conception.[102]

iii. Sensing a Secret in the Family

One study states that before they are told the truth, 50% of donor offspring suspect that their "social" father is not their biological father.[103] In contrast, the same report revealed that only 9% of parents who used donor insemination intended to tell the truth to their children by the time they turned 12 years old.[104] These figures highlight a large problem with donor-assisted conception. Most

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[99] *Supra* note 94.
[100] *Supra* note 89.
[101] *Supra* note 94.
[102] *Supra* note 94.
[103] *Supra* note 94.
[104] *Supra* note 94.

recipients do not want to tell their children about the use of a donor; however, this is increasingly being found to cause pain and resentment in the family.

Despite the attempted deception, offspring are not oblivious to the situation. Many offspring have reported that they can sense that something is amiss in their families. This manifests itself as beliefs that their mother had an affair,[105] that their mother was raped,[106] that they were adopted[107] or that something was "not quite right."[108] For example, one man stated that from the age of five or six "he sensed that his father, a man he loved and respected, wasn't his "real" father – but he did feel a biologic link to his mother." [109] He believed, like many other donor offspring, that he was either adopted or was the result of an extra-marital affair.[110] It is not comfortable for a child to believe that a parent had an affair. It is, in fact "and idea that was troubling to [the donor offspring] for a number of reasons, not the least of which was his reluctance to believe that his mother would betray his "father.""[111]

iv. Anger at Deception

It appears that if donor offspring are told about their parent's method of conception, it is often only elicited during duress. Frequently the individual was told at the death of a parent, during a fight with a parent, by a third party, or in a

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[105] P. Peck, "InsemiNation: Anonymous Sperm Donation" *Lycos Health – WebMD.* (20 August 2001), on-line: < http://webmd.lycos.com/content/article/1674.51778 > (date accessed: 01 August 2003).
[106] *Supra* note 94 at 1.
[107] M. Wente, "Mommy, where did I come from?" *The Globe & Mail* (08 August 200), on-line: <htt ttp://www.cuckoografik.org/trained_tales/orp_pages/news/news6.html > (date accessed: 01 August 2003).
[108] *Ibid.* and *supra* note 94 at 3.
[109] *Supra* note 105.
[110] *Supra* note 105.
[111] *Supra* note 105.

confrontation with their parents about their feelings. There is a real danger, or likelihood, that a child will learn about his or her origins by accident or by someone other than the parent if the parent chooses not to tell the child. Because recipient parents tend to tell others about the use of donors more frequently than they tell their own children, there is a notable risk that this will be disclosed to the donor offspring by a non-parent.[112] The damage that this would likely cause to the donor offspring is obvious.

Donor offspring who were told in those kinds of circumstances express strong resentment toward their families for keeping the donor a secret as long as they did, or for attempting to deceive the offspring about their genetic parentage. One British donor offspring stated that she felt "that her entire life was based on a lie and was furious with her mother for dying with this secret."[113]

The negative feeling accompanying the discovery typically resulted in a breakdown in family relationships. The University of Surrey studied that there is a definite risk of mental health problems for "Children who are not told how they were conceived."[114] Thus in an attempt to maintain familial ties, parents choose to conceal the use of a donor. In fact, such deception typically severs family ties and causes lingering resentment.

v. Right to Know

The University of Surrey study mentioned above concluded that: "the right to know their genetic origin was a common theme with all but one of the

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[112] *Supra* note 75 at 16.
[113] *Supra* note 89.
[114] *Supra* note 89.

participants and many had recourse to fantasy about their donor fathers as a coping strategy."[115] One British donor offspring stated that the right to know the identity of the donor is part of the larger right to know one's genetic parents.[116] He described the feeling of entitlement in this way: "this right, like any authentic human right, would not only benefit those individuals who assert it but should be seen as one of the conditions of a decent society. It is the right not to be deliberately deceived about our essential personal history."[117] An American man has stated that he believes that "knowing about your origin...is a civil rights issue."[118]

vi. Meaning of "Identity"

Although donor offspring frequently express a need to know the identity of the donor, it is unclear what they mean when they use this phrase. "Identity" can refer to any number of realities that can be expressed in terms of a gradient. It could mean simply knowing the donor's name, perhaps his or her contact information at the time of donation, a photograph (at the time of donation or current), current contact information or a meeting. Some offspring merely seek more details than the standard non-identifying information that is provided, if it was provided. Others may want to know the donor's name, if he or she has a family,[119] what he or she looks like,[120] speak to him or her or meet him or her.

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[115] *Supra* note 89.
[116] *Supra* note 92.
[117] *Supra* note 92.
[118] *Supra* note 105.
[119] B. Cordray, "Searching for Dad" *Daily Herald* (27 November 2002), on-line: <dailyherald.com/suburbanliving/suburban_story.asp?intID=375861> (date accessed: 20 January 2003).
[120] *Ibid.*

Meeting the donor is the highest level of connection that any donor offspring have reported to want. One study of donor offspring concluded that all but one of the eighteen participants wanted to know the identity of their donor.[121] The researchers of that study concluded that the participants "reported a sense of loss and grief about never being able to know their biological origins."[122]

One individual stated that he simply wanted to "find out about" his donor.[123] He stated that the experience of thanking his donor for "the gift of life" and shaking his hand, "helped heal something inside." Furthermore, this brief meeting was all that this man wanted from the donor: "He wasn't my dad. He didn't change my diapers. He didn't take me fishing. He's just my biological provider."[124] Despite seeing the donor in this limited capacity, the feeling of deep healing meant that this man felt like a completely different person than he was before the experience because he found out "who [he] was."[125]

This man's account of his experience is illustrative of the very important fact that none of the literature has reported any donor offspring seeking a relationship, emotional or financial support from their donor. Despite fears that donor offspring are looking for another parent, there is nothing to suggest that this is the case. Donor offspring recognise their "social" parents, the recipients, as their parents, but may still feel a sense that an important piece of information is missing. For them, this information takes the form of the identity of the donor. It

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[121] A. Turner and A. Coyle, "What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counseling and therapy" (2000) 25:9 Hum. Rep. 2041 at 2053-2055.
[122] *Ibid.* at 2060.
[123] G. Wiatt in *supra* note 119.
[124] G. Wiatt in *supra* note 119.
[125] *Supra* note 119.

is important to the individual to knowing this information, in a way that is comfortable to him or her. Both obtaining the information and receiving it in a positive context heals a unique and deep-rooted pain.

B. Conclusion on Offspring's Views

Many people refer to the desire to have a child "of their own" in reference to having a child that shares their own genes. For example, one ethics text made the point that people "may need the assistance of a sperm or an egg provider...or of a surrogate mother if the couple is to have a child who is in some sense the couple's own."[126] Another article notes that "[i]t is heartwrenching for couples to accept the only way they can have a child is by using someone else's genetic material. And often that realisation comes only after years of stressful attempts to have their own child."[127]

If the only way that you are someone's "own" child is if you share a genetic link to your parent, then children who do not have this link must be someone else's children. Although the phrase may simply be an unfortunate semantic construction, it illustrates the value that society places on genetics. As a result, individuals who do not share a genetic link with both parents will very likely feel as if they are somehow "less than" other people.

Some suggest that donor offspring are simply expressing a desire to know their genetic origins because of a socially constructed emphasis on genetics. A great deal of literature has been written about the nature of the link between

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[126] R. Hull, *Ethical issues in the New Reproductive Technologies*, (Belmont, California: Wadsworth, Inc., 1990) at 18.
[127] R. Eccleston "Dear Dad (whoever you are...)" *The Australian Magazine* (18-19 April 1998), 12 at 16.

genetics and family relationships in the changing world of reproductive and genetic technologies.[128] Additionally, many authors have expressed the concern that if we allow genetics to play too great of a role in our self-identification, then the importance of social relationships will inevitably diminish.[129]

It is not necessarily true that if genetics plays a role in the development of an individual's self-identity that the same individual will devalue his or her social relationships. The ability to feel like a complete human being and to ensure one's physical and psychological well-being is a deeply personal and unique undertaking. As such, we must be cautious in presuming that there is a link between the valuation of genetics with a necessary devaluation in social relationships.

The relationship between genetics and family, as widely discussed by the authors mentioned above, does not address the role of the donor within the individual donor offspring's own self-identification. The donor will not necessarily be viewed by the donor offspring as a "familial" entity. Before one

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[128] H. Abdalla *et. al.* "Social Versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation" (1999) 40(4) Jnl. Child Psychology & Psychiatry & Allied Disciplines 519-527; P. Baird, "Reproductive Technology and the Evolution of Family Law" (1997) 15 C.F.L.Q. 103; N. Bala, "The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach" (1994) 8 Int. J. L & Fam. 293; K. Daniels, "Toward a Family-Building Approach to Donor Insemination" (2002) 24(1) J. O.G.C. 17; J. Edwards, "New Conceptions: Biosocial Innovations and the Family" (1991) 53 Journal of Marriage and the Family 349; R. Deech, "Family Law and Genetics" (1998) 61 Mod. L. Rev. 697; R. Rhodes "Genetic Links, Family Ties and Social Bonds: Rights and Responsibilities in the Face of Genetic Knowledge" (1998) 23 J. Med. & Phil. 10; M. Richards, "Families, kinship and genetics" in R. Marteau and M. Richards (Eds.) *The Troubled Helix: Social and Psychological Implications of the New Human Genetics* (Cambridge: Cambridge University Press, 1996) at 249.

[129] See, for example: S. Burtt, "Genetic Kinship and Children's Rights: Do Children Have a Right to be Raised by their Biological Parents?" (2000) 16(2) Protecting Children 44-53; T. Caulfield, "Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing" (2000) 26 Queen's L.J. 67; J. Hill, "What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights" (1991) 66 N.Y.U.L. Rev. 353; D. Nelkin and M. S. Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (New York: Freeman, 1995) at chapter 4 "The Molecular Family."

asks what the implications of genetic links to donors have on the family unit, it must first be determined what the implications are for the donor offspring. In this way, it is important to recognise that each donor offspring will experience his or her role as donor offspring in a unique way. Due to the inability to determine a universal attitude among a large, diverse group such as donor offspring, it is imperative that the experiences of the individuals within the group are given respect. This approach has been termed the "phenomenological approach" and has been described by Dr. Laura Shanner as emphasizing "listening to the people who are living the experience about which we are trying to develop policies, so that we can understand what it is like for them to be having that experience."[130] The information obtained from individuals can then be used to establish appropriate rules and policies for the group. Thus, Dr. Shanner states that "[c]ommon themes in the individual narratives often converge, allowing us to convey a nuanced and altered understanding an a new composite narrative or practices and shared phenomena."[131] With this approach in mind, one can see that the focus of genetic links to the family as a whole may displace the importance of the experience of the individuals within the family. This would be particularly undesirable when one of the individuals within the family is in a distinctively vulnerable role: namely the donor offspring.

Even if donor offspring are seeking out their genetic identities because of a social emphasis on genetic relations, then the burden of feeling the pain of

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[130] L. Shanner, "Bioethics through the Back Door: Phenomenology, Narratives, and Insights into Infertility" in L. Summer and J. Boyle (Eds.) *Philosophical Perspectives on Bioethics* (Toronto: University of Toronto Press, 1996) at 122.
[131] *Ibid.* at 122.

lacking something important should not be passed on by the recipients who so badly want a genetically linked child to the donor offspring who will have no ability to deal with their own pain. It is contrary to every appropriate ideal about parenting to think that having a child to fulfil one's own needs without regard to the child's needs is acceptable.

Moreover, whether or not the desire to have a child who is genetically linked to oneself and the seemingly connected desire to know one's genetic origins are socially constructed should not discount individual's expressed feelings of these needs. In certain cases, if people express that a certain state of being causes them great pain, there is no need to require anything more than those people's words. For example, when Canada extended the right to vote to women, or implemented the Charter, specific new legal rights and rights principles were established. The establishment of these legal rights was not based solely on objective, identifiable proofs of harm, but rather were decisions made by Canadians based upon their sense of right and wrong.

Given that no other people can experience what it feels like to be a donor offspring, the views expressed by donor offspring should be taken at face value and respected as their own truths. The experiences of donor offspring should be accepted as the most important data in the establishment of donor conception legislation. Therefore, asking donor offspring to identify why they feel harmed by donor anonymity and to quantify the amount and type of harm is requiring a level of proof that has not been necessary in other instances of Canadian legal rights development.

III. RECIPIENTS

A. Why Choose Donor Conception?

The views of recipients are critical in determining what the law can and should say about donor anonymity. Any rights conferred upon donor offspring by the law to know their genetic origins can be rendered meaningless if recipients choose not to tell their children that they are donor offspring. Most recipients choose donor conception over adoption because of a desire to have a child that is genetically linked to oneself or one's partner. One donor offspring tells the story of her mother's decision to attempt donor conception rather than adoption, as advised by the physician, in this way: "My mother told me that she knew straightaway that she could not do this [adopt a child]. She very strongly wanted her own baby. She wanted to be pregnant and give birth to her own child, and nothing else would do. Adoption was not an option for her."[132]

B. Desire to keep Use of Donor a Secret

As has been previously noted, recipients can have strong feelings about the anonymity of donors. This typically arises in their decision to keep the use of a donor secret from their child or children. Recipients may choose to use donor gametes and not feel comfortable having their choice made known to others. One study reported that only 30% of parents in New Zealand told their children that

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[132] *Supra* note 98.

they were conceived using a donor.[133] Another study found that only 8.6% of European children conceived through the use of a donor were told.[134] The same study found that 50% of IVF children and 95% of adopted children had been told about the nature of their origins.[135] This may indicate a significantly lower level of comfort with the use of donor gametes than with IVF or adoption.

In Sweden, where anonymous donation was abolished in 1985, the number of recipient parents who tell their children about their use of a donor is also very low. One study reported that only 11% of parents had told their children.[136] Nonetheless a small majority (58%) of parents said that they were going to tell their children at some point in the future.[137] This is significant because Swedish law asserts the right of the donor offspring, upon reaching the age of majority, to know the identity of their donor. Thus, the parents who do not tell their children are denying the children the ability to exercise a legal right.

Not all recipients are uncomfortable telling their children that they are donor offspring. As it becomes more acceptable to use donors, and as more psychological literature is produced showing the ill effects of keeping this information from children, recipients are more inclined to tell their children. Where some recipients feel threatened by the potential that their children might want to know more about the donor, others can understand this urge. One recipient father noted that:

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[133] *Supra* note 75 at 11.
[134] S. Golombok *et. al.*, "The European Study of Assisted Reproduction Families: the Transition to Adolescence" (2002) 17(3) Hum. Rep. 830.
[135] *Ibid.*
[136] C. Gottlieb, O. Lalos, & F. Lindblad, "Disclosure of donor insemination to the child: the impact of Swedish legislation on couples' attitudes" (2000) 15: 9 Human Reproduction 2052.
[137] *Ibid.*

> [w]hen you have a baby yourself you become more aware of your own history - I have become more interested in my parents and their parents since having my daughter. I used to think – if you are happy, why do you need to know those sorts of things? Whereas now I think the issue is that she can't know part of hers.[138]

Other recipients have felt that the special way that their children were conceived can be a source of pride for themselves and their children.[139] Instilling children with this pride can also be a way of strengthening the bond between parent and child. Recipients have reported that they feel that being open helped their child to feel that there was trust and respect between them.[140]

C. Stigma over Male Infertility

At one time, the dominant theory favoured concealing a child's genetic identity from the child. When donors were first being used, the recipient parents were advised by the medical staff against telling children about the use of a donor:

> A concern existed that a non-genetic relationship between parents and children might in some way negatively affect parenting and in past this advice came from the reluctance in semen donation programmes to 'publicly' acknowledged (sic) the presence of a male factor infertility problem.[141]

The stigma over male infertility is a large factor in the shame that is perceived with the use of a donor.[142] Professor Dan Cohn-Sherbok of the University of Kent agrees that the concealment of the use of a donor is often done

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[138] S. Pettle & J. Burns, *Choosing to be open about donor conception: the experiences of parents* (United Kingdom: Donor Conception Network, 2001) at 12. The website for the Donor Conception Network is: <http://www.dcnetwork.org> (date accessed: 01 August 2003).
[139] *Ibid.* at 2.
[140] *Supra* note 138 at 2.
[141] *Supra* note 75.
[142] *Supra* note 107 at 1.

to protect a man from his shame about being infertile.[143] Professor Cohn-Sherbok also noted that the relationship between the infertile father and the child may suffer because the father sees the child as "a symbol of his failure to reproduce."[144]

One study found this stigma may cause a decrease in "family functioning."[145] The investigators concluded that there is a:

> [r]elationship between stigma and father's parental warmth and parental fostering of independence suggests, however, that perceptions of stigma may affect the father-child relationship adversely. It is possible that fathers who feel greater overall stigma may psychologically distance themselves from their DI offspring or have concerns about stigma affecting their child that differ in degree from the mothers' concerns.[146]

The reduction in warmth and fostering of independence may be because the father may see the child's independence "as a threat to privacy or confidentiality."[147]

One Canadian donor offspring expressed his views that the medical community continues to allow the shame over male infertility to flourish. He stated that the medical community is "creating this climate of denial around it and the reason they're creating a climate of denial is to protect the feelings of the

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[143] Professor Dan Cohn-Sherbok, Professor of Jewish Theology at the University of Kent, as quoted in J. Reid "Mummy, What's a Sperm Donor?" *The Independent* (19 March 1996), as reproduced in the "Donor Conception Support Group Newsletter" (September 1996) *Donor Conception Support Group*, P.O. Box 53, Georges Hall, New South Wales, Australia, 2198, <members.optus.home.com.au/dcsg>.

[144] *Ibid.*

[145] R. Nachtigall *et.al*, "Stigma, disclosure, and family functioning among parents of children conceived through donor insemination" (July 1997) 68 Fertility and Sterility 1 at 86.

[146] *Ibid.* at 88.

[147] *Supra* note 145 at 86 & 88.

father because he is ashamed of his fertility and wants to forget about it."[148] This conclusion was echoed by an Australian child and family policy researcher who noted that the medical community's recommendations to hide the use of a donor "came from the reluctance in semen donation programmes to 'publicly' acknowledged *(sic)* the presence of a male factor infertility problem."[149] Another man created by donor insemination told the story of his difficult relationship with his "hostile" father.[150] He said that his father was uncomfortable with him all throughout his childhood and then when he, as an adult, was told about the nature of his conception his father refused to see him any longer. This man believes that his father's problems were rooted in shame about his infertility and identifies the problem in this way: "the child is a walking talking symbol of sterility of the dad."[151]

D. Keeping Family Secrets

Theories about openness in families are changing. There is an increasing body of literature from family therapists that emphasizes the negative impact of family secrets on children and families as a whole.[152] The Royal Commission on New Reproductive Technologies concluded that its "research showed that

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148 *Supra* note 70 at 4.
149 *Supra* note 75.
150 *Supra* note 94 at 4.
151 *Supra* note 94 at 4.
152 *Proceed With Care, supra* note 47 at 465; *Turner supra* note 120;.G. Annas, "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor" (1981) 60(3) Child Welfare 161-174; D. Brown and J. Davis, "Artificial Insemination by Donor (AID) and the Use of Surrogate Mothers: Social and Psychological Impact" (1992) 9(2) Decree 8; G. Landau, "To Reveal or not to reveal a secret" (2003) 57(1) Am. J. of Psychotherapy 122-137; S. Lewis Cooper & E. Sarasohn Glazer, "Choosing Assisted Reproduction: Social Emotional and Ethical Considerations" in *Emotional and Ethical Consideration of Assisted Reproductive Technology* (Perspectives Press: The Infertility and Adoption Publisher), Preconception.Com., on-line: < http://preconception.com/resources/articles/social2.htm > (date accessed: 01 August 2003 and A. McWhinnie, "A study of parenting of IVF and DI Children" (1995) 14 Med. Law. 501-508.

maintaining secrecy about the means of conception can be contrary to the best interests of the child."[153] Additionally, there is evidence to suggest that recipients are becoming increasingly comfortable with openness. The Nachtigall study on disclosure noted that "older, longer married" recipients were less likely to disclose the use of a donor to their children.[154]

E. Reproductive Freedom of Recipients

Some say that requiring parents to tell their children about their genetic origins impedes the reproductive freedom of parents.[155] It can be argued that if a parent wants to use anonymous donor gametes and is instead legally required to disclose this information to their child, then the parent is effectively barred from exercising his or her reproductive choice.[156] Furthermore, we tend to view choices about how to raise a family as private. Thus, there can be a sense that recipients should not be told how to raise their children. Although this is not technically a reproductive right, but is more of a familial right, the two are often linked together and identified as comprising a private realm in which only the parent has the right to make decisions.

F. Conclusions on Conflicting Views of Parties

There is not a great deal of comprehensive evidence on the global views of all donors, recipients and donor offspring. This makes conclusions difficult to make. For example, one study suggests that, in general, donor offspring are more

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[153] *Supra* note 47 at 464 (Vol. 1).
[154] *Supra* note 145.
[155] Cooper and Glazer *supra* note 152.
[156] Cooper and Glazer *supra* note 152.

likely than recipients, and far more likely than donors, to agree that donor offspring have a right to identifying information of the donor.[157] Another study indicates that most donors would like to meet their donor offspring.[158] The important conclusions that can be made are that a recognisable number of donor offspring express a fundamental need to know the identity of their genetic donor and that a recognisable number of recipients do not want to tell their children that they are donor offspring.

Psychology is becoming more aware of the problems that arise in families that keep important secrets. Over time, the impact of these secrets has been evaluated by psychologists. Whereas in the early days of donor conception the dominant theory was that the donor offspring would be better off if they were simply allowed to believe, or told, that their social parents were their genetic parents. This is no longer the acceptable theory. One psychologist stated that it is critical for children to know how they were conceived and further that "[n]ot knowing her genetic heritage can put a child at risk, especially as studies reveal new links between heredity and certain diseases."[159]

In an article about the roles marriage and family therapists play in assisting people with the issues surrounding "new" forms of conception, therapist Anne Bernstein emphasises the point that secrets are damaging to the family and the child or adult offspring.[160] Bernstein outlines the potential for psychological

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[157] *Supra* note 86 at items 27-35.
[158] *Supra* note 75.
[159] R. Israeloff, "Family Secrets: What your children should and should not know" (August 1994) *Parents* at 37.
[160] A. Bernstein, "Making Sense of New Conceptions...in a Family Way" (February 1995) 26 Family Therapy News 1, as reprinted in *Perspectives Press' Fact Sheets*, P.O. Box 90318,

distress to those who have been deceived about their conception history and the trend towards openness in assisted human reproduction as seen in adoption.[161] Bernstein reminds us that "[w]hile information can be troubling, suspicions can be more so."[162]

Although more research into these areas must be done, such research and any resulting conclusions must be approached with caution. It must first be recognised that any individuals who have donated in Canada have done so in an *ad hoc* anonymous system. As such, their views are necessarily influenced by social norms, which to date have been that gamete and embryo donors are anonymous. Thus, surveys of Canadian donors' views regarding anonymity cannot be taken as representative of the views of all potential donors.

The ability to conduct a comprehensive survey of the views of parties involved in donor conception is also constrained by the lack of a right of Canadians to know if they are donor offspring. Any surveys conducted would only include the views of people who were told that they are donor offspring. However, that group may be a small proportion of the actual number of people who were conceived with the assistance of a donor.

In two studies conducted in the United Kingdom in 1995 and 1996 with 45 families who used donor insemination, none of those parents had told their children about the donor.[163] Another study illustrates that even if recipients choose a known or identifiable donor, they may not want their children to have

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Indianapolis, IN 46290, on-line: <http://www.perspectivespress.com/abtherapists.html> (date accessed: 01 August 2003).

[161] *Ibid.*

[162] *Supra* note 160.

[163] *Supra* note 75 at 3.

the same privilege. Only 37% of parents using a known donor indicated an intention to tell the children about the use of a donor.[164] Given the reluctance on the part of some recipients to tell their children, the proportion of donor offspring who can participate in any such survey might be small. The views of such a group might also not reflect the experiences of other individuals whose parents were even less comfortable with discussing the use of a donor with their children.

Without the cooperation of physicians and clinics, we cannot even know basic statistical information about donor conception. The Royal Commission noted that currently there are no records kept about how many donor-conceived children are born in Canada each year.[165]

Although there is a definite need for greater research into this area, the lack of record-keeping and statistical conclusions should not serve to devalue the views that have been expressed. At some point, statistical analyses will not be able to adequately express human feelings. It should not be necessary for individuals, or groups of individuals, to be able to point to scientific findings to lend credence to their personal feelings. If this standard was the rule, there would have been no advancements in minority or gender rights.

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[164] *Supra* note 75 at 3.
[165] *Supra* note 22.

Chapter 4 - REASONS WHY THE FEDERAL GOVERNMENT CHOSE DONOR ANONYMITY FOR BILL C-13

The dissonance among the various interested parties' views on the donor system illustrates the necessity for a carefully tailored legislation. Bill C-13 prioritises the privacy rights of the donor over any other competing rights or interests. Bill C-13 allows the donor to remain anonymous, and the recipient parent or parents to keep their use of a donor secret. The two primary reasons cited by the federal government for the establishment of this kind of donor system are that it closely parallels provincial and territorial adoption legislation and that it respects the privacy rights of the donors. Each of these reasons will be analysed in light of the legal principles that inform and relate to them.

I. Similarity with Adoption Legislation and Legal Consistency

Laws should be consistent with one another lest the integrity of the justice system be compromised. Thus, it is important to draft legislation that embraces the same fundamental legal principles that have developed the current legal system. However, a rigid approach to legislative drafting that focuses on legal consistency might preclude the ability for law to develop. As society's needs and values change, so should the laws that are informed by society. Consequently, legislators ought not to look to other legislation simply as a restriction of the parameters of new legislation. Legal consistency does not make the law static,

but provides a way for legislators to incorporate the most fundamental legal principles into new legislation.

There is a natural inclination to compare gamete donation with adoption because of the apparent similarities between the two. However, there are dangers in constructing gamete donor laws to mimic adoption laws. Canadian provinces' original adoption laws were written in a social context that is very different from the current day. The values and attitudes of society several decades ago, particularly about reproductive issues, informed the establishment of adoption laws that put a premium on secrecy and anonymity. There was no knowledge of the ill effects of keeping a child's origins secret from him or her.

Only a couple of decades ago, adoption was viewed in a very different light than at present. Unwed mothers were a source of shame given that pre-marital sex was taboo. Over time, it became more apparent that many adopted children wanted to know about their biological origins. At the same time, many biological parents were happy to know that the baby that they had given up for adoption had grown into a healthy, happy adult. Because of these inclinations, both on the part of the adopted individual and the biological parents, openness in adoptions became acceptable and even preferred.

It has become increasingly commonplace for people to seek "private adoptions" in which the biological and social parents can stipulate the terms of the adoption. Private adoptions typically take the form of open adoptions, in which identities are typically shared between the parties.[166] British Columbia enacted

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[166] - P. Gower & M. Philp, "Fighting to keep the biological ties" *Toronto Star* (25 November 2002) online: <www.thestar.com> (date accessed: 01 December 2002).

legislation creating an open adoption system in 1996 such that there is unqualified access to birth and adoption records by biological parents and adopted adults.[167] Newfoundland has also recently amended its adoption laws to provide for an open records system.[168]

The trend towards openness in adoptions is indicative of society's changing beliefs about what is best for adopted children and other parties to adoption. If gamete donor law models itself on the typically outdated adoption laws that are in place in most Canadian jurisdictions, it will be repeating the mistakes of history rather than learning from them.

The movement towards change in adoption law and society's attitudes to adoption raise the important issue of the appropriate role of law in social change. Historically, adoption laws did not provide for any means of information release to adopted people. Without the legal change to require the maintenance of birth and adoption records, we would not have been able to observe the consequences of the release of this information to adopted adults. Fortunately, awareness of the benefits of openness has expanded to encompass the legitimacy of an adopted adults' desire to know his or her origins. Adoption itself has not collapsed because of openness. In fact, it has probably survived in a large part because of the legal amendments permitting openness.

Law may be a reflection of society but it also proscribes limits that necessarily shape society's attitudes and beliefs. People embraced openness in

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[167] *Adoption Act*, R.S.B.C., 1996, c. 5, on-line: <http://www.qp.gov.bc.ca/statreg/stat/A/96005_01.htm> (date accessed: 01 August 2003).
[168] *Adoption Act*, S.N., 1999, c. A-2.1 (proclaimed May 1, 2003), online: <www.gov.nf.ca/hoa/statutes/a02-1.htm> (date accessed 01 August 2003).

adoptions and pushed for appropriate legal accommodations for their wishes. Nonetheless, the law's permission of openness in adoptions necessarily encouraged society's comfort with openness. In the same way, donor anonymity laws encourage stigma and shame over the gamete donor process. By legislating anonymity, the law explicitly condones donor secrecy.

Canadian clinics have historically attracted donors who were comfortable with an anonymous system. It would be improper to draw conclusions about the general perspectives of potential donors based on those donors who have donated under an anonymous system. Similarly, after several years of an ad hoc anonymous donor system, Canadians are more familiar with donor anonymity than they are with the possibilities of an identity-release system. While we ought to draft laws that reflect society's values, we must also recognise that these same values will be influenced by what the law deems to be appropriate or correct.

The effect of Bill C-13 will be to create a system that attracts only prospective donors who agree with anonymity. The effect of creating a legal right of donor anonymity will perpetuate antiquated views about the rights of donors to anonymity and the rights of donor offspring to know their genetic identities. Given that there is a notable trend in adoptions and adoption legislation towards openness, the establishment of a right of donor anonymity is a reflection of where the law has been rather than where it is going. History can be a great teacher, but ought not to be used as a justification for making the same mistake twice. The principle of legal consistency, therefore, leads to the conclusion that gamete donor

laws should acknowledge the importance of openness for children's genetic identities.

II. Privacy Rights of Donors or Privacy Rights of Donor Offspring?

The second argument that is widely used by proponents of anonymous donor systems is that the privacy rights of donors must be protected by policies and laws. The debate over how to balance the privacy rights of donors with the claims of offspring to know their genetic identities presupposes that donors have a right to conceal their identities from offspring. That is, one must examine whether or not donors actually have a right to privacy. If it is found that donors have such a right it must be determined how this right is legally constituted before one can appropriately balance such rights with any others involved in the donor conception context. However, without such a *prima facie* right, the argument that donors' rights to privacy must be legally protected cannot stand.

The presumption that donors have a right to privacy was made apparent by the Standing Committee in its Second Report on assisted human reproduction.[169] The Committee stated that "where there is a conflict between the privacy rights of a donor and the rights of a resulting child to know its heritage, the rights of the child should prevail."[170] Health Canada referred to the "donor privacy" argument in its Feedback Report.[171] In that report, Health Canada presented the arguments and viewpoints that were obtained in preparing Bill C-13. The report acknowledged the debate between those who sought the primacy of the right of

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[169] *Supra* note 59.
[170] *Supra* note 59.
[171] *Supra* note 74.

individuals to know their genetic heritage and "those who favoured the right to anonymity of the genetic parents."[172] The issue has also been the subject of debate in the House of Commons. Many members of Parliament have expressed their concern that "the government has attached a greater weight to the privacy rights of donors than to the access to information rights of donor offspring."[173] This concern was echoed by many other members in the debates regarding Bill C-13.[174]

The proposed law places the privacy rights of the donor above all other interests. Rights of other parties are sacrificed for the protection of donor privacy. However, the right to privacy is a contingent right. It is meaningless to talk about a right to privacy if more fundamental rights are not protected. If the law must choose between the fundamental rights of one party and more abstract, contingent rights of another party, it should seek to protect the fundamental rights. For this

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[172] *Supra* note 74 at section 2.2.5.

[173] R. Elley, M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard, Number 47 (28 January 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/047_2003-01-28/HAN047-E.htm#Int-390190> (date accessed: 01 August 2003).

[174] See, for example, S. Day, M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard, Number 47 (28 January 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/047_2003-01-28/HAN047-E.htm#Int-390190 (date accessed: 01 August 2003); R. Harris, M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard, Number 47 (28 January 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/047_2003-01-28/HAN047-E.htm#Int-390190> (date accessed 01 August 2003); A. Hanger, M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard, Number 47 (28 January 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/047_2003-01-28/HAN047-E.htm#Int-390190 (date accessed: 01 August 2003); A. Burton, , M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard Number 69, (27February 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/069_2003-02-27/HAN069-E.htm> (date accessed: 01 August 2003); R. Casson , M.P., Speech to the House of Commons (37th Parliament, 2nd Session), Edited Hansard, Number 85 (7 April 2003), on-line: <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/085_2003-04-07/HAN085-E.htm> (date accessed: 01 August 2003).

reason, the privacy rights of the donor should be accommodated only if the offspring's right to security of the person has been protected.

A. Does Canadian law acknowledge a right to donor anonymity?

We might need to ask if Bill C-13 is preserving a "right" or creating one. In Canada there is currently no legal right to privacy for donors. Bill C-13, if it comes into force, is the first legislation that will address donor issues in Canada. If it establishes an anonymous donor system, it will be creating a new right in Canada: the right of donors to conceal their identities from the offspring who are conceived through their donations. Thus, Bill C-13 is not protecting a right that already exists, but is entrenching into law the clinical practice of allowing donors to remain anonymous.

B. Is the entrenchment of a donor's right to privacy consistent with other Canadian legislation?

Bill C-13, therefore, will add a new chapter to privacy rights in Canada. Although there is generally no concern with the establishment of a new legal right, we must be extremely cautious when that new right will eclipse the rights claims of a competing interest group. In order to determine if this new right to donor anonymity should be established at the price of the claims of donor offspring to know their genetic identities, the two competing claims will be analysed in the Canadian legal context.

C. Does Canadian law acknowledge a right to know one's genetic identity?

There is no specific legal right to know one's genetic heritage in Canada. For example, neither adopted children nor children born through donor-assisted conception have a right to know their genetic parents. There is no law in Canada that states that anyone has a legal right to know his or her genetic parents. Moreover, Bill C-13 would necessarily eliminate that right from being legally acknowledged. This effect of Bill C-13 must be considered in order to determine if donors' rights to privacy can be created within the Canadian legal framework.

i. Family Law – Custody, Access and Support Case Law

If we look outside the realm of donor-assisted conception and instead look once again at family law, there are some decisions that might demonstrate a growing awareness of the importance of knowing one's genetic parents. Some cases, such as *A.S.M.* v. *R.S.* address the issue as one of health.[175] In that case, the Court was asked to order a paternity test. The judge found this to be important such that the child in question could have a connection with his biological father. Aside from financial and medical reasons, the judge also stated that the determination of paternity "is a most compelling issue that requires far more focus and may have far more impact on this child."[176]

Another case identifies the importance of determining a child's paternity for the "social and health concerns that stem from the identification of the biological father, all of which would enable the child to assume her rightful place

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[175] *A.S.M.* v. *R.S.*, [1999] N.S.J. No. 128 (F.C.).
[176] *Ibid.*, at 9 and 10.

in society."[177] Other cases hint at the desirability of telling a child the truth about his or her genetic background for the child's well-being. In one instance, the judge stated that:

> Ascertaining the truth about one's parentage is very important. Significant medical or genetic information may become available. Financial support might be available. One can even speculate about the possible negative emotional consequences that might result from a person learning later in life that the identity of her biological father is an open-ended question.[178]

This case dealt with the determination of paternity primarily for support reasons but shows the significance that a genetic parent would hold to his or her offspring. Of course, Canadian law has developed such that adopted and donor-conceived children cannot make the same legal arguments as other children. In this way, laws that preclude a right to know the identity of one's genetic parents may be unconstitutional. Some might say that the distinction exists because adopted children and donor offspring will have 'social' parents that can take the place of genetic parents. Clearly, the importance of the role of 'social' parents is not to be downplayed. Legally it is the 'social' parents who accept the responsibilities of being parents to the child. It seems; however, that with increased awareness about the harmful effects of keeping the truth about a child's genetic background from him or her, courts are beginning to place greater value on the role of knowing the genetic parents for the child's well-being. At one time, declarations of paternity may have been made solely for reasons of determining support and access, however, these recent decisions indicate a broadening of the grounds for

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[177] *S.A.M.D.* v.*R.F.*, [1998] O.J. No. 900 (Gen. Div.) (Q.L.) at para. 27.
[178] *J.R.* v. *L.L.G.*, [1998] O.J. No. 2903 (Gen. Div.)(Q.L.) at para. 16.

making such rulings. It may be upon these types of cases that donor offspring would be able to assert a legal right to know their donors.

ii. Cases in the United Kingdom and European Union

A case has been brought before England's High Court in which an adult donor offspring and a minor donor offspring (through her parents) seek identifying information about the sperm donors that were used in their conception. The case, *Rose* v. *Secretary of State for Health*[179] (hereinafter "*Rose*') centres on the interpretation of Britain's new Article 8 of the *Human Rights Act*[180] which guarantees the right to family life and personal identity. Although the entire judgment has not yet been reported, Baker, J., has stated that "An AID [artificial insemination by donor] child is entitled to establish a picture of his identity as much as anyone else."[181] *Rose* also draws on the interpretation of the *European Convention on Human Rights* (*ECHR*) which was the model for the British *Human Rights Act*.

The interpretation of Article 8 of the *ECHR* was the subject of a case before the European Court of Human Rights in *Gaskin*.[182] In that case a British man who had lived his childhood as a ward of the state in numerous foster homes, sought access to the government's records concerning his care. Article 8 of the *ECHR* provides that:

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[179] *Rose* v. *Secretary of State for Health* [2002] E.W.J. No. 3823 (Q.L.).
[180] *Human Rights Act*, 1998 (U.K.), c. 42.
[181] "UK's High Court Gives Hope to Sperm Donor Campaign." *Yahoo! News – Canada*. (26 July 2002), on-line: < http://ca.news.yahoo.com/020726/5/nv9x.html > (date accessed: 22 November 2002.
[182] *Gaskin* v. *United Kingdom* (1990), 10454 Eur. Ct. H.R. 83, 12 E.H.R.R. 36.

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[183]

The Court weighed out the potential harm to the child care system if foster parents and health care workers felt that their information and documents might be released someday to the foster child in their care. Furthermore, the Court was concerned that this might dissuade forthright communication among the relevant parties in the child's care to the detriment of the integrity of the system as a whole. It accepted the right of Mr. Gaskin in the nature characterized by the European Commission of Human Rights as encompassed by Art. 8 of the *ECHR*. The Commission noted that the "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification."[184] Although the Court found that the state had violated Art. 8, it did so because there was no third party mechanism in place to determine the appropriate balance between individual and community rights in each instance. As such, the decision is not explicit about the extent of an individual's rights to obtain information necessary to form his or her identity, but it has provided the impetus for British courts to analyse Art. 8 of their *Human Rights Act* in that manner.

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[183] *Ibid.* at para. 34.
[184] *Supra* note 182 para. 39.

iii. The Canadian Charter of Rights and Freedoms

a. Section 15

The Canadian Charter does not include a similar guarantee of respect for private life as in Art. 8 of the *Human Rights Act*. The Charter has a general right to life, liberty and security of the person, but it has not, of yet, been interpreted to include the right to form one's genetic identity. This oversight in Canadian law may be due to the fact that not all laws written prior to the Charter have been scrutinized by the Charter's requirements. As such, laws that would limit a person's right to know the identity of his or her genetic parents, such as adoption laws, have not been brought before a court to determine their constitutionality.

A lot of the language used in the determination of Charter rights sound like it would support the claims of donor offspring. For example, in *Egan*, L'Heureux-Dubé J.held:

> At the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable and equally deserving. A group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration.[185]

The description used seems to be applicable to donor offspring under the proposed Bill C-13. The donor offspring have expressed their feelings that they

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[185] *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 at para. 39.

are unable to do something, namely know their genetic parents, as other Canadians can do. The reason why they cannot know this is because of the nature of their conception. This is seen as being a justification for treating donor offspring differently and with a lack of respect and consideration for their well-being.

Another concept that has been analysed by the courts in Charter cases is that of "human dignity" within the parameters of section 15. For example, in *Law* Iacobucci, J. stated:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? [186]

From this analysis, it would be reasonable to conclude that there is a *prima facie* violation of donor offspring's human dignity in anonymous donor models. As a group they have expressed feeling devalued and ignored. Additionally, they have expressed the psychological pain that has resulted from the anonymous donor system. From the standpoint of donor offspring, Bill C-13 treats them unfairly by

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[186] *Law* v. *Canada (Minister of Employment and Immigration)* (1999) 170 D.L.R. (4th) 1 at para. 53.

focusing on personal circumstances which do not relate to individual needs, capacities or merits.

Nonetheless, the structure of the Charter is such that there would have to be an elucidated 'right' of all other Canadians to know their genetic parents. We have not yet come to that. Instead, by default, the vast majority of individuals naturally have this ability and therefore it has only recently been asserted as a right. Unfortunately, the Canadian government is always quick to point out that donor offspring have rights that are equal to those of adopted children. Perhaps this too is an oversight in our legislation. We now know that both adoption and donor insemination originated with health care workers urging parents to keep such things from their children. This was most likely done to avoid the stigma and shame associated with the use of these procedures. Nonetheless, we have come a long way to realise that such beliefs are damaging. We have not yet altered our laws in light of this knowledge. Thus, it is clear that section 15 of the Charter will be of no help to donor offspring in their attempt to assert a right to know their donors.

b. Section 7

Section 7 of the Charter guarantees the right to life, liberty and security of the person. Security of the person refers to the long-held notion that one's body should be free from interference by others. This includes a respect for personal bodily integrity, both physical and psychological. It has been accepted in

Canadian law that "security of the person" is a broader right than a restriction on physical interference of one's body. For example, in *Mills*[187], Lamer, J. held:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation"... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

Although this analysis was clearly being carried out in the context of a potential Charter s. 11(b) violation, it illustrates the expansive nature of the "security of the person" guarantee. Lamer, J.'s definition indicates that security of the person includes the freedom to not be psychologically harmed by government actions, given that even psychological harm can have grave consequences in an individual's life.

In *Morgentaler*, Dickson C.J. accepted the above definition as applicable outside of the criminal context into general section 7 assessments.[188] The Chief Justice held that, "If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(b), it should be relevant to the general case of s. 7 where the right is expressed in broader terms."[189]

It is evident that donor offspring suffer psychological harm from their inability to form a personal identity and, furthermore that this is instituted by the anonymity of their genetic histories. Consequently, it would follow that the

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187 *Mills* v. *The Queen*, [1986] 1 S.C.R. 863 at 919-920.
188 *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 (Q.L.).
189 *Ibid.* at para. 19.

Charter would protect the interests of donor offspring. Nonetheless, this has not yet happened, and it may not happen given the reasons discussed above in the section 15 analysis. Thus, although one can identify potential Charter protection for the rights claims of donor offspring, any adjudication of the matter would have to be situated within the present legal context. If Bill C-13 is passed, that legal context will include a specific guarantee for the anonymity of donors which courts might be more inclined to protect over a general claim by donor offspring to obtain donor identities.

iv. Conclusion of existence of legal right to anonymity and genetic identity

Canadian law does not explicitly recognise a right of donor anonymity or a right for donor offspring to know their genetic identities. The two right claims are mutually exclusive, and as such, only one can be elucidated in Bill C-13. In order to determine which of these two right claims is more appropriately protected by legislation, the legal principles that comprise privacy rights must be analysed.

D. What is the meaning of "privacy" in the legal realm?

Once privacy is guaranteed in legislation, there are few circumstances in Canada when that privacy will be violated.[190] At its base, the right to privacy

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[190] Canadian courts have wrestled with the balance between the right to privacy and other rights such as the right to a fair hearing and the right to make full answer and defence. The difficulty in balancing these sometimes competing rights can be seen in criminal cases where the accused seeks production of documents that would normally be considered to be private. For example, the Supreme Court of Canada has had to determine when a sexual assault complainant's counselling notes, diary entries or past sexual history details will be produced as a necessity for the security of the rights of the accused to a fair hearing and to make full answer and defence. In some instances, the privacy right over the documents is determined to be less important than the right of the accused to make full answer and defence of the charge against him or her. In this way, Canada

would only include those things that are intuitively private. Privacy presupposes something personal and individual about the thing that is being protected. In general, the more something impacts on other people, the less private it is. For example, while one could easily find a right to be free from being surreptitiously videotaped in one's own home, there is no corresponding right when one is in the public sphere. Another illustration of this principle is that although my thoughts are private my words can be censored and any public documents that I create will have to fit within the boundaries of what the legislation deems to be acceptable. Thus, there is a spectrum along which privacy rights can be seen to exist and this spectrum consists of the amount of impact my actions have on other individuals.

E. Nature of Rights over One's Own Body

The right to be free from harm is now thought of as the right of "security of the person." At its most basic, the "person" denotes one's body. It is obvious that security of the person encompasses a right to be free from physical harm. It is not as clear if the kind of pain expressed by donor offspring would also be encompassed by such a right. This debate can be solved without commencing an analysis on Cartesian dualism or any other theories that attempt to determine the point of distinction between the mind and the body. If one's "person" refers to one's body, then all things connected with that body should also be included. That is, one cannot separate oneself from one's thoughts or feelings like one can

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has determined that there is a greater societal need to keep the innocent from being wrongly convicted than to uphold the privacy rights of an individual over personal matters. For cases that discuss these issues, see, for example: *R.* v. *Shearing* [2002] S.C.J. No. 59 (Q.L.); *R.* v. *Darrach* [2000] 2 S.C.R. 443 (Q.L.), *Mills supra* note 181; *R.* v. *Carosella* [1997] 1 S.C.R. 80 (Q.L.), *L.L.A.* v. *A.B.* [1995] 4 S.C.R. 536 (Q.L.) and *R.* v. *O'Connor* [1995] 4 S.C.R. 411 (Q.L.).

remove a jacket. Thus, the fact that one is indelibly chained to one's pain, whether it is 'physical' or 'mental' illustrates that such pain is of the "person." As such, psychological pain should be encompassed within "security of the person."

Donor offspring state that they suffer great pain from the anonymous donor system. They feel that there is an essential part of them missing and that this stops them from knowing themselves sufficiently so as to form a personal identity. Although this is a psychological pain in so far as it is not strictly physical, it retains an important link to the person's body. The feeling that one's body is not quite one's own until it can be 'claimed' and 'understood' is a psychological trouble that results from both physical and psychological origins.

It is well recognised that "security of the person" includes the right to be free from psychological harm, as illustrated by the Charter analyses previously mentioned. Thus it is not necessary to link the pain expressed by the donor offspring to something physical for it to be accepted as a right in the nature of security of the person. Nonetheless it is important to understand that the pain is connected to the person's body. The pain itself derives from a lack of familiarity with one's body and genetic characteristics, which are not merely physical. Thus, it is not entirely sufficient to limit the harm experienced by donor offspring as either physical or psychological. However, it is appropriate to characterise the pain as the sort that the right of security of the person seeks to prevent.

F. How Can Donors Assert a Right to Privacy?

The protection of one's identity is one type of privacy claim that has become increasingly important to Canadians. The use of technology to record and maintain vast amounts of personal information has coincided with an erosion of the traditional community. Consequently, the boundaries of the appropriate uses of our personal information may have changed, while the ability to misuse such information has grown. In the information age, we are less comfortable providing our telephone numbers or home addresses for fear that of an invasion of personal information. A few generations ago, the technology was not available to misuse personal information to such a degree. As such, people had a more narrow opinion of what privacy included.

This concern over the misuse of our personal information and identities may have contributed to a legal presumption that certain activities, such as gamete donation, should be anonymous. It is more likely that the desire to protect the privacy of donors stems from a shame of infertility, particularly male infertility and a taboo over the use of a stranger's genetic material in creating one's child.[191]

Throughout the evolution of our laws there were many instances where an activity that was once regarded as morally reprehensible remains illegal long after society has accepted the activity. It is likely that as more people use assisted human reproduction technologies society's attitudes about those technologies will change. As society's views on an issue change, so shall the corresponding laws. For example, the laws that deal with adoption were originally created when

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[191] *Supra* note 75 at 10.

society had a very different view of adoption than it has now. It may be that a potentially outdated moral shadow has been cast on the use of donor gametes and that it is this shame that the law seeks to protect, rather than any *prima facie* right to privacy.

Correspondingly, there is no violation of identity *qua* privacy if one engages in an activity where it is known that his or her identity will be used for a specific purpose. Take for example a situation where Anne is interviewed by the local newspaper for her opinion on changing the name of Main Street. The reporter is seeking people who are willing to have their names, pictures and opinions published in that week's paper. The reporter informs Anne of this and seeks her consent before proceeding to interview her on the subject. Once Anne is aware of the nature and use that will be made of her opinion, she can decide if she wants to participate in the interview or not. If Anne decides to proceed with the interview and her photo, name and opinion are printed in that week's newspaper, she cannot then claim that her privacy had been violated. This is an illustration of how consent vitiates, or at least qualifies one's right to privacy. Individuals may consent to the use of their 'private' information if they are permitted to choose whether or not to participate in that use.

Other countries have created legislative schemes whereby donors consent to the release of their identifying information to donor offspring or recipients. In essence, the potential donors who do not want their identity released are free to not participate in an open model. Potential donors who are comfortable with the release of their identity will have no problems participating. Thus, privacy claims

will be waived by participants through their consent. Consent in this situation would have to be given after the potential donor is made aware of the implications of that consent. The service provider (clinic) would have a corresponding responsibility to provide the potential donor with all the relevant information up front such that the donor is able to provide informed consent to the donation process.

III. Legal Conclusions

It is difficult to establish a specific legal right to know one's genetic identity when the government has enacted laws against that right in the realm of adoption and intends to solidify that position with respect to donor offspring in the *AHRA*. Canadian law prioritises privacy rights over the right to know one's genetic identity because the latter right has not yet been established in Canadian law. Despite the fact that Charter analyses from the Supreme Court of Canada indicate that Charter principles include the right to be free from psychological harm, the structure of the Charter analysis itself might preclude such a claim from being advanced. That is, it is likely that donor offspring would be compared to adopted children rather than to any other children and as such, that a court would not determine that there has been a discriminatory violation. Additionally, the Charter sets up an unfortunate tautology: donor offspring cannot claim that their rights have been violated until they establish that right within the current Canadian legal context. If that context necessarily disregards the existence of such a right, a Charter application may not be successful.

This is not a situation where the law cannot protect the rights of the donor offspring without violating other rights. The so-called right to privacy exists only in constructed situations. Given that the donor's participation in this process is entirely voluntary, anyone who would be deeply troubled by being an identifiable donor will not participate. In this way, only donors who are comfortable with being identified will donate and as such, their privacy rights will not be violated because they have consented to the process and do not feel any harm from identification.

IV. Conclusions from the Analysis

A donor's right to keep his or her identity private flows from the legal creation of such a right. In an anonymous donor system, the donor's anonymity is meant to conceal his or her identity from any prospective offspring that are created from the donation. The assertion of privacy operates to maintain anonymity from the offspring rather than conceal the fact that one has donated gametes.

In contrast to the right of donor anonymity, which exists only if constructed, the right to dominion over one's own body exists by virtue of being a human. Thus, the right to control one's body, and hence to make decisions about one's body, is an essential, inalienable right. The right to dominion over one's body is reflected generally in notions of security of the person. This basic right has led to the modern concepts of informed consent to medical procedures and to the right to access one's own medical records.

The right to dominion over one's body must include the ability to access information about one's genetic makeup. The genetic background of donor offspring can be withheld from them on the basis of the right of donor anonymity, but this information is an essential part of the donor offspring's identity. It seems reasonable that an individual would be able to access information about his or her body to the extent that it is possible. A person should have control over who accesses his or her genetic information. Given that this information is highly private and personal, it does not follow that third parties should have greater rights than the individual to his or her genetic information. Third parties should have access to such information only if the individual waives his or her right to the confidentiality of that information. In anonymous donor systems, however, this information is specifically concealed from the donor offspring, when they are the very people who ought to have access to their own genetic information.

The denial of the right of donor offspring to know their genetic identities is qualitatively different from the "right" of donors to be anonymous. The former refers to a right to know oneself, whereas the latter refers to the right to be able to participate in a specific kind of donor system. There is no comparison between the importance of being able to construct one's genetic identity and being able to be an anonymous donor.

A prospective donor has the ability to choose to be a donor or not to participate in the system at all. It is only when a donor agrees to participate in the anonymous donor system that he or she acquires the right to anonymity. If the same donor agrees to participate in an identity-release system, then he or she

would not have a legal claim to anonymity. Donor offspring do not have a choice about the concealment of their genetic identities. Thus, if it is extremely important to a potential donor that he or she remains anonymous and the donor system does not provide for such a guarantee, then that individual need not donate. In contrast, if it is extremely important to a person who is a donor offspring to know his or her genetic identity, that individual cannot choose to access the relevant information.

Chapter 5 - RECONCILING THE COMPETING INTERESTS

Despite the fact that there is no single solution that will appease all interests, the most appropriate legal system is one that will address the concerns of all interested parties. However, when there is a conflict between competing interests or rights, the best law will prioritise interests by according the greatest protection to the most important needs. Canadian law has sought to assess the importance of various needs by ensuring that the interests of the most vulnerable parties, such as children, are protected. In accordance with the principle of protecting the most vulnerable parties, Bill C-13 adopts the following as one of its stated principles: "[t]he health and well-being of children born through the application of these technologies must be given priority in all decisions respecting their use."[192] The importance of this principle in Canadian law is also reflected in the approach taken by the House of Commons Standing Committee on Health when it analysed the draft *Assisted Human Reproduction Act*. The Standing Committee placed the protection of the emotional and physical health as well as the essential dignity of the children created by assisted human reproduction procedures as one of its three priorities for evaluating the draft legislation.[193]

Another way to assess the competing interests in this situation is by considering which interests or rights are most fundamental, and therefore deserve the most protection. Donors participate in the donor system through consent. If a prospective donor chooses not to donate, then his or her life has suffered no great

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[192] *Supra* note 1 at s. 2(b).
[193] *Supra* note 59 at s. 2 A (i).

consequence. Donor offspring have no ability to choose how they are conceived, but in an identity-release system they could choose whether or not they wanted to know the details of their genetic identities. If this choice is denied to them, their rights over the control over their own bodies will be fundamentally constrained.

The essentially human desire to know one's genetic background, as expressed by some donor offspring, is also evidenced by the recipients' desire to have a child with at least some of their own genetic material. The Royal Commission on New Reproductive Technologies concluded that "most Canadians would seek medical help to conceive before looking into adoption because of the importance of this [genetic] link."[194] On the one hand, many donor recipients feel that it is important for them to have a child with as much of a shared genetic link to themselves as possible. For example, a couple in which the male partner is infertile may choose to use in vitro fertilisation with donor sperm in order to have a child who shares genetic material with the female partner. The desire to have a child that is genetically related to oneself is widespread and readily accepted. On the other hand, the urge of donor offspring to know the identity of their non-parental genetic donor is not as accepted. If it follows that there is an acceptable, fundamental urge to create children with one's own genetic material, then correspondingly there must be an acknowledgment and acceptance of the desire of those children to know their true genetic histories. Accordingly the right to be able to control one's own body is much more fundamental then the right to be an anonymous donor, and as such, the more fundamental right ought to be protected in law.

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[194] *Supra* note 47 at 463 (Vol. 1).

Chapter 6 - RECOMMENDATIONS FOR DONOR LEGISLATION

In keeping with the fundamental legal principles of legislative consistency and privacy rights, Canada ought to re-draft Bill C-13 to accord donor offspring with the right to know their genetic identities. This would appropriately prioritise the most important and fundamental rights of the most vulnerable people over the contingent rights of people that have the power to consent to the system.

I. Legislation in Other Countries

It is helpful to study legislation from other countries that have implemented open, or identity-release donor systems. Reviewing these laws and their effects will serve to illustrate that identity-release donor systems are feasible. Furthermore, a survey of the legislative provisions in other jurisdictions with identity-release laws will allow observations to be made about the mechanisms and components of such laws.

Canada is one of the later Western nations to draft laws regulating assisted human reproduction. Therefore, it enjoys the benefit of observing legal progression in other countries. Nonetheless, it does not seem to be following the growing trend of other countries which are moving away from anonymous donors. One of the first countries to adopt an identity-release system is Sweden, which abolished donor anonymity in 1985.[195] Swedish law confers a right to all

[195] *Supra* note 78 at 232.

donor offspring to be given the identity of their donors.[196] Donor offspring cannot access the donor's identifying information until they have reached an age of maturity. There is not specific age established for "maturity," instead it is up to the parents or recipients to determine when their child is sufficiently mature to receive this information.[197] Although parents can determine when to tell their children about the donor, there is a specific requirement on the parents to tell their children that they were conceived through the use of a donor.[198] Parents have been given guidance by the Swedish government in this regard. The government has encouraged parents to tell their children as early as possible at a suitable time[199] and before the child reaches the upper teen years.[200]

Similar legislation is in force in Australia in the State of Victoria.[201] The amendment to Victoria's donor legislation which served to establish the donor offspring's right to receive identifying information about their donor was made in January 1998.[202] Victoria's law now provides that donor offspring may receive identifying information about their donors once they have attained eighteen years of age.[203] It is expected that the remaining Australian states will follow suit with similar legislative amendments.[204]

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[196] *Act on Insemination (Sweden),* (1984:1140) at section 4.
[197] A. Lalos, K. Daniels & C. Gottlieb, "Recruitment and motivation of semen providers in Sweden" (2003) 18 Human Reproduction 1, 212 at 212-213.
[198] *Ibid.* at 212-213.
[199] The Children's Society (United Kingdom), "A Child's Right to Identity," on-line: <www.childsoc.org.uk/news/news_items/childs_right.htm> (date accessed: 01 August 2003).
[200] *Ibid.* and *supra* note 197 at 212-213.
[201] *Infertility Treatment Act 1995* (Vic.), section 79, on-line: <http://www.austlii.edu.au/au/legis/vic/consol_act/ita1995264/index.html> (date accessed: 01 August 2003.)
[202] *Ibid.*
[203] *Supra* note 201.
[204] *Supra* notes 76 and 89.

New Zealand is in the process of legislating an identity-release system through its proposed *Human Assisted Reproductive Technology Bill*.[205] The Bill emphasises the paramount importance that the legislation must place on the welfare of children born through the use of assisted human reproductive technologies.[206] The Bill stipulates that donor offspring who are eighteen years old may access identifying donor information, but there is a provision that if a family law court consents, donor offspring who are sixteen may also obtain the information.[207] The Bill has not yet become law, but at present, New Zealand clinics will only accept sperm from donors who are willing to be identifiable to recipients and offspring.[208] Thus the provisions that will come into force in the Bill are already being implemented as clinical policies.

Austria has also implemented legislation that has abolished anonymous donors.[209] Donor offspring in Austria are able to access identifying information about their donors at fourteen years of age.[210] Austria amended its donor legislation to allow for donor offspring to obtain their donor's identities as part of their obligations as signatories to the *United Nations Convention on the Rights of*

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[205] Ian Llewellyn, "Government unveils controversial reproduction laws" *The New Zealand Herald* (14 May 2003), on-line: <http:www.nzherald.co.nz/storydisplay.cfm?StoryID=3501849&msg emaillink> (date accessed: 01 August 2003).

[206] *Human Assisted Reproductive Technology Bill (New Zealand)*, Part IV, Section 25. Information available on-line: <http:www.justice.govt.nz/pubs/other/pamphlets/2003/hart/questions.html> (accessed Aug 1, 2003).

[207] *Ibid.*

[208] *Supra* note 75.

[209] *The Reproductive Medicine Act (Austria)* (FMedG Federal Law Gazette, (BGBl) 1992/ 275) at section 20.

[210] Malta Biocthics Consultative Committee, "Comparison of Ethics Legislation in Europe," online: <http://www.synapse.net.mt/biocthics/euroleg1.htm> (date accessed:August 1, 2003).

the Child (hereinafter the "CRC").[211] The CRC provides that all children have a right to their "identity."[212] As such, Austria interpreted "identity" as including genetic identity.[213] Therefore, children in Austria now have a legal right to know their genetic identities.

Some countries are in the process of reviewing and amending their donor identity laws. For example, the United Kingdom has been reviewing and re-writing its legislation over the past couple of years. One of the most highly contested issues is the prospect of identifiable donors, given that it is possible that the United Kingdom's amended legislation will eliminate its anonymous donor system. The donor system is currently regulated in the United Kingdom as part of *The Human Fertilisation and Embryology Act.*[214] Additionally, Japan's Reproductive Support Medical Care Committee, part of the health ministry's Health Sciences Council recently declared that children born through the use of donor gametes or embryos have the right to know the identity of their donors.[215] Members of the Council believed that the rights and welfare of children born through assisted human reproduction were the "top concern."[216] The proposed law will create a public body for the maintenance of donor information and will

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[211] *Convention on the Rights of the Child*, 20 November 1989, (Gen. Ass. Res. 44/125), U.N.T.S., (entered into force 2 September 1990). Note that Canada ratified the *Convention on the Rights of the Child* in 1991. As such Canada must consider the implications of the evolving international law on the determination of the rights of donor offspring under the *Convention* as it is bound by its obligations under the *Convention*.

[212] *Ibid.* at s. 8.

[213] Austria, "Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Addendum" Submission to the United Nations, Committee on the Rights of the Child, CRC/C//11/Add.14, (26 June 1997) at s. C, para. 152.

[214] *The Human Fertilisation and Embryology Act, 1990* (U.K.), c. 37, on-line: <http://www.hmso.gov.uk/acts/acts1990/Ukpga_19900037_en_1.htm> (date accessed 01 August 2003).

[215] "Right to know" *The Asahi Shimbun* (1 March 2003), on-line: <http://www.asahi.com/English/national/K2003030100338.html> (date accessed: 04 April 2003).

[216] *Ibid.*

provide donor offspring with information, including identifying information, about their donor when the offspring are fifteen years old.[217] This declaration is expected to lead to legislation within the next year.[218]

II. CONCLUSION ON DONOR LEGISLATION IN OTHER COUNTRIES

Although this thesis is not a complete survey of all nations' donor legislation, the previous review serves to indicate a movement away from donor anonymity in several nations. Over the past decade, many countries have reviewed their donor legislation and have determined that, at the very least, the issue of donor anonymity must be addressed further. Sweden has shown that the law can move to an identity-release donor system without causing the entire donor conception service network to be dismantled. As more countries note the Swedish example, they have been less reluctant to move away from anonymous donor systems. As well, the number of donor offspring that are coming forward in various countries provides information to governments and societies about the experience of donor offspring in anonymous systems. The offspring's viewpoints seem to have provided the impetus for many governments to reconsider their donor anonymity provisions.

Health Minister Anne McLellan has stated that: "we have developed a Bill that is balanced and ethical – one that will put us in step with other industrialized nations."[219] Unfortunately, Canada has chosen to ignore the

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[217] "Panel: Raise veil on sperm, egg donors" *The Asahi Shimbun* (1 March 2003) www.asahi.com/English/national/K2003030100303.html (date accessed 06 April 2003).
[218] *Supra* note 215.
[219] *Supra* note 72.

legislative reform in the other industrialized nations that indicates a trend away from donor anonymity. Given that Canada has had the opportunity to wait and see how identity-release legislation has worked out in other countries, it is odd that Canada would choose to implement a legislative scheme that is currently being abolished by so many other nations.

III. Proposed Model Donor Law For Canada

Canada sits at a position where it can easily establish an open donor system. This thesis argues that such a system is legally recommended and, as such, will present a legislative model for Canada. The model will be based on the Swedish legal framework for the release of donor information to donor offspring.

The Swedish law is ideal because it has been in place since 1985, and therefore any legal problems associated with the law have had a considerable amount of time to arise. Thus far, there have been no successful legal challenges to the Swedish donor law.

Additionally, the Swedish system contains the three most important elements of an identity-release system. The first element is the legal clarification of the obligations of the donor to the recipients and offspring. The second is the stipulation of a mandatory age minimum for donor offspring to obtain the donor's identity. The last element is an obligation on the part of the recipients to tell their children that they are donor offspring. This is necessary so that the donor offspring can choose whether or not to exercise their rights to know the identity of their donor. There is also another step that should be taken by the federal government that would not form part of the legislation, but that is important in

assisting past donor offspring with their search for their genetic identities. This would involve establishing a voluntary registry for donors and offspring.

IV. Legal Boundaries For Donors' Protection

A. Definitions of Parties Involved in Donor Conception

In order to protect the legal boundaries of all parties, legislation should be drafted with clear definitions of parents and donors. These definitions can be incorporated as part of the assisted human reproduction law or as part of family law. Ideally, both pieces of legislation would include the same definitions. A universal definition is most prudent given that it would allow claims brought under different laws to be tried with the same definitions. This would assist judiciaries in creating case law that is definitive and clear on the definitions of "parents" and "donors."

B. Restriction of Legal Claims Among Parties to Donor Conception

There should also be legislation that explicitly restricts any legal claims flowing between offspring and donor, or recipient and donor. In this way, no claims for support, access or custody would be able to be advanced and the 'social' parents of the child would be given the appropriate status of any other parents in the law. With the exception of Quebec, Newfoundland and Yukon, Canadian jurisdictions have not passed laws stipulating the limits on donors' legal responsibilities to any offspring that result from their donations.[220]

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[220] *Supra* note 76.

Legal restrictions on parental responsibilities may be implied by the determination of a child's parentage. As such, the legal limitations that can be placed on the responsibilities of donors is closely linked to the legal definitions of donor and parent. New Zealand has created an excellent comprehensive law in this regard. The *Status of Children Amendment Act*[221] defines the rights and responsibilities of adults involved in a number of assisted conception situations. The Act addresses the legal roles of individuals involved in donor semen procedures as well as donor ovum and embryo procedures.[222] The Act explicitly states that donors are not parents and confers the social parents with parental rights and responsibilities.[223] One portion of the Act states that "the man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, unless that man is, or at any time becomes, the husband of the woman."[224] A similar clause ensures that ovum and embryo donors are not identified as parents and have no such legal responsibilities or rights.[225]

The New Zealand legislation is helpful in that it provides clear definitions for parties involved in many difference assisted-conception scenarios. It is important that any Canadian legislation that delineates the legal rights and responsibilities of the parties to assisted conception address all forms of donors, rather than focusing on sperm donors.

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[221] *Status of Children Amendment Act 1987* (N.Z.), (principal statute: *Status of Children Act 1969* (*N.Z.*)), online: <http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes> (date accessed: 01 August 2003).
[222] *Ibid.* at ss. 6-9.
[223] *Supra* note 221 at s. 9.
[224] *Supra* note 221 at s. 9(2)(b).
[225] *Supra* note 221 at s. 9(3).

C. Cases that Address the Legal Role of Donors

Without such legislation in place, there is a risk that the legal ambiguities remaining may cause problems even within an anonymous donor system. For example, a Scottish court recently awarded a sperm donor with parental rights while at the same time denying the female partner of the child's mother the same rights.[226] The facts of the case indicate that the man conferred with parental rights was more than a typical "sperm donor." He was, in fact, a friend of the mother who had agreed to assist her with conceiving a child. Furthermore, there was an agreement between the man and the mother allowing him to have access to the child.[227] The man clearly intended to be a significant part of the child's life even before the child's conception. Nonetheless, it appears that after the child's birth, the man's attempts at involvement with and support for the child were thwarted. The "sperm donor" therefore viewed himself more as a father in the larger sense rather than simply a "sperm donor."

A recent Australian case, *Re Patrick*,[228] also delved into the determination of paternity in the case of a sperm donor offspring being raised by his mother and her female partner. *Re Patrick* involved a child who was conceived through a sperm donor by a woman in a committed, same-sex relationship. The "donor" was an acquaintance of the child's mother and an agreement regarding the donation procedure and the sperm donor's rights was drawn up prior to the child's conception. Nonetheless, the details of that agreement were contested by the

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[226] *Pursuer against Defender in the Case of Child A*, (6 March 2002), Sheriff L. Duncan, on-line: <http:// www.scotscourts.gov.uk/index1.asp> (date accessed 01 August 2003).
[227] *Ibid.*
[228] *Re Patrick*, [2002] 28 Fam.L.R. 579 (LexisNexis).

parties with the sperm donor submitting that the agreement provided him with visitation rights.[229] The child's mother and his female co-parent did not allow the sperm donor to have access to the child. Thus, the sperm donor brought an application before the Court for a determination of his rights and responsibilities regarding the child.[230]

Although Victoria is the only Australian state that has abolished anonymous donation, a federal law exists that specifically addresses the legal status of the parties involved in assisted human reproduction procedures. The Australian *Family Law Act*[231] defines the parents of a child born through an "artificial conception procedure" in various contexts. If a man and a woman are married at the time of the procedure and have consented to the procedure, then they are legally the child's parents regardless of the child's genetic parentage.[232] If a woman undergoes an artificial conception procedure then the child is deemed in law to be her child.[233] If a woman in the latter instance is not legally married but is in a "genuine domestic" relationship as if married, then her and her male partner will be deemed to be the child's parents.[234] Thus, the Australian law essentially identifies a donor offspring's parents as his or her "social parents." The law is of great assistance in providing this definition, but has a gap in circumstances of single women or women in same-sex relationships. In the latter

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[229] *Ibid.*
[230] *Supra* note 228.
[231] *Family Law Act (Australia)* 1975, s. 60(H), on-line: <http://www.scaletext.law.gov.au/html/pasteact/0/229/0/PA001910.htm> (date accessed 01 August 2003).
[232] *Ibid.*
[233] *Supra* note 231.
[234] *Supra* note 231.

situations, the law does not address the identity of the child's father. It is this gap in the law that caused the legal confusion in *Re Patrick*.

In the decision Guest, J. stated that: "it is clear that gay and lesbian families were not considered by the legislature when s 60H of the Act was being drafted."[235] Guest, J. concluded that the legislation needed to clarify the role of same-sex partners in assisted conception procedures.[236] Additionally, the principles used to determine parentage in situations with heterosexual couples ought to be applied with same-sex applicants.[237] These principles include the recognition of the importance of the relationship between the applicant and child and the effect that the relationship has on the child.[238] The decision ultimately found fault with the law for not acknowledging the role of a sperm donor for a lesbian couple. It was determined that a relationship with the sperm donor was in the best interests of the child and that although the sperm donor in this situation was not the child's "father," as per the *Family Law Act*, he was accorded the right to have regular contact with the child.[239]

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[235] *Supra* note 228 at para. 330.
[236] *Supra* note 228 at paras. 330-35.
[237] *Supra* note 228 at paras. 330-35.
[238] *Supra* note 228 at paras. 308, 325-35.
[239] *Supra* note 228 at para. 308. It is of note that this case had a devastatingly tragic ending when "Patrick's" mother killed "Patrick" and committed suicide, four months after the court decision. It is reported that the mother was "obsessed" with excluding the sperm donor from "Patrick's" life, but that after the decision things seemed to settle as her partner arranged the visits between "Patrick" and his sperm donor. Nonetheless, it is also reported that the mother received psychiatric treatment following the court decision. For information see: F.Walker, "Lesbian Mum Kills Son" *The Sun-Herald* (4 August 2002) *The Sydney Morning Herald*, on-line: <http://www.smh.com.au/articles/2002/08/03/1028157861390.html> (date accessed: 01 August 2003).

D. Recommendations for defining the rights and responsibilities of donors

Although there has been litigation regarding "sperm donors" and paternal rights, the existence of these kinds of cases is not a reason to fear identifiable donor systems. Instead, these cases show a need for clearly-written definitions on the roles and responsibilities of parents and the limits placed on the roles and responsibilities of genetic donors. The Scottish case occurred in an "anonymous" donor legal context, but was a private agreement gone awry.[240] *Re Patrick* also involved a private agreement between parties known to each other.[241] The existence of private contracts indicates problems with the way people perceive public donor conception services. There may be concerns with access to the services or misgivings with the system itself. Nonetheless, it is necessary for the law to clarify the definition of gamete donors and to provide parameters for their legal protection. For these reasons, the legal definitions should consider the various family contexts including heterosexual and same-sex parents. The law should also take into account the possibility that people will create their own contracts for sperm donation and should attempt to establish the roles, rights, responsibilities and limitations of the parties. The two cases that involve private contracts discussed here illustrate the problems that can occur when people feel that they must attempt to create their own legal situation.

The importance of the link between parent and child does need not be argued. However, in our modern era, the definitions of parent and child have

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[240] *Supra* note 226.
[241] *Supra* note 228 at para. 308.

been flexed and expanded to include many non-traditional family groupings. Additionally, the increasing use of new reproductive technologies influences the way that we define family ties. Although some donor offspring may seek to know the identity of their genetic donor, they do not characterise the donor as a parent. From a child's standpoint, this indicates a significant difference between genetic donors and individuals who play some kind of parental role. The latter may even be someone who has been for the most part absent from a child's life but who nonetheless retains an important bond with the child. Indeed legislation has attempted to clarify the unique relationship of the donor to the child as one of a genetic but non-parental link. It is this essence that must be analysed and articulated in order to make sense of offspring's desire to know the identity of their donors.

V. Mandatory Age Minimum for Donor Offspring to Obtain Donor's Identity

Given the sensitive nature of obtaining the identity of one's donor, the law ought to establish a minimum age upon which any donor offspring could apply to obtain such information. In Canada, people who were adopted typically can apply to obtain information about their biological parents at the age of majority.[242] The countries with identity-release systems that were surveyed in this thesis stipulate age minimums ranging anywhere from 14 in Austria to 18 in New Zealand and the State of Victoria, Australia.

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[242] This is a general reference to the mandatory age minimum that is used by provinces when using consent-based information registry services. It is not meant to indicate that adopted people can access any manner of information merely by attaining the age of majority and requesting such information from the provincial government.

Although psychologists advocate telling children from a very early age a basic story about the nature of their background,[243] it would not be until an individual is an adult that he or she would be prepared to make a decision as to whether or not he or she wants to know the identity of the donor. The decision about whether or not to apply for the donor's information is also contingent upon knowing that a donor was used. There may be reluctance on the part of the recipients to tell young children about this information, despite the encouragement of child psychologists to do so. None of the laws surveyed impose a time limit on when donor offspring can apply for the identifying information. Thus, it is not necessary that an individual donor offspring applies for their donor's information as soon as he or she reaches the legislated age minimum. If the individual does not wish to obtain such information, there is no requirement that the application is made or that it is made promptly. In this way, the mandatory age minimum has greater implications for determining when donor offspring should know about the circumstances of their birth. Although most of the laws surveyed do not explicitly require recipient parents to tell their children that they are donor offspring, there is an implied expectation that they will do so by the age at which the donor offspring can apply for donor information.

The Swedish law merely requires that recipients tell their children when the recipients deem their children to be sufficiently mature. At that time, the

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[243] *Supra* note 147; K. Daniels & K. Taylor, "Secrecy and Openness in Donor Insemination" (1993) 12:2 Politics and the Life Sciences 155,G. McGee, S. Brakman & A. Gurmankin, "Gamete Donation and anonymity: disclosure to children conceived with donor gametes should not be optional" (2001) 16:10 Human Reproduction 2033; E. Noble, *Having Your Baby by Donor Insemination* (Boston: Houghton Mifflin Company, 1987) at 310-317; E. Singer, "Talking with Children Conceived Through Donor Insemination, IVF with Egg Donor or Surrogacy" (Fall 1997) Focal Point at 8-9.

donor offspring can apply for the donor's information. Although the Swedish system seems to be ambiguous with regard to age minimums, it allows the parents the greatest control in when to tell their children. The requirement that recipients tell their children that they are donor offspring can be seen as a positive measure that increases the chances that the donor offspring will learn from their own parents in a healthy manner, that they are donor offspring. This requirement might serve to avoid the damaging instances when donor offspring find out that they were conceived through the use of a donor from a third-party or in traumatic circumstances.

Thus, although it is advisable that donor offspring be required to be in their upper teen years before they are provided with the legal opportunity to obtain information about the donor, it is not necessary that donor offspring must wait until that age to learn that they were donor-conceived. The decision of whether or not to obtain the donor's identifying information, and any subsequent decisions regarding contact with the donor are of sufficient significance that they should only be undertaken by mature individuals.

VI. Obligation on recipients to tell children

The rights of donor offspring to know their genetic identities will lack substance if there is not a corresponding duty on recipients to tell their children that they are donor offspring. Donor legislation should explicitly include this responsibility. Elaine Gordon, an expert on parenting and assisted human reproduction issues advises that children be told "the truth about how they came into the world, even before they can understand what you're saying; that way they

will never remember not knowing."[244] In this way, children will feel comfortable asking "age-appropriate" questions as they grow.[245] Nancy Pihera, a health educator and director of an Atlanta clinic also advises that children be told at an early age.[246] Ms. Pihera "counsels clients to tell children as soon as possible about the circumstances of their birth."[247]

This advice corresponds with the theory that children can sense a problem when something is being kept secret and that the suspicions can be more difficult for the child than knowing the information.[248] Individuals who discover that they are donor offspring when they are adults have said that they suspected that something was amiss throughout their childhood and would have preferred that they were told earlier to have spared them such angst.[249] Similarly, a recipient mother and founding mother of the United Kingdom's Donor Conception Network believes that children should be told that they are donor offspring "long before the unsettling puberty years."[250] It seems, therefore, that the shock and trauma of discovering what the family secret is about can be avoided by telling children at a very early age the basics about the use of a donor. Legislation ought to require that parents tell their children early on in their childhood. In order to make this task easier, educational programs, support and information should be available to such recipients. In time, as donor conception becomes more socially acceptable, it is unlikely that recipient parents would need such guidelines.

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[244] Elaine R. Gordon, in *supra* note 159 at 37-38.
[245] Elaine R. Gordon, in *supra* note 159 at 38.
[246] Nancy Pihera, *supra* note 105 at 3.
[247] Nancy Pihera, *supra* note 105 at 3.
[248] *Supra* note 160 at 3.
[249] *Supra* note 160 at 3.
[250] Olivia Montuschi in *supra* note 94 at 4.

Some might argue that enforcement of such a law is difficult. Given that the practical application of enforcement would be nearly impossible, it may be that the federal government itself should inform individuals that they are donor offspring once they reach the age at which they could apply for the donor's identity. Arguably, it would be traumatic to receive notification about such a thing from the government. Nonetheless, accounts given by donor offspring indicate that they would rather know the truth than continue to be deceived.

VII. Registries

Even if Bill C-13 were amended to create an identity-release system, it would not assist all the donor offspring that are currently searching for their donors. In order to protect the rights of donors who have already donated under conditions of anonymity, there should not be any retroactive application of an identity-release system.

Voluntary registries that allow donors and offspring to control their participation in the release of their identities should be established in order to provide donor offspring the greatest opportunity possible to obtain vital genetic information without infringing on donors' rights. The federal government should establish a voluntary registry for all donors. In this way, if a donor is comfortable being identified, he or she could contact the registry and give information as to when and where he or she donated. This information could be matched up with that of donor offspring such that they could potentially find their donors. One

recipient mother has established an online donor/sibling/ offspring registry.[251] This kind of private action will likely increase as more donor offspring seek information about their genetic identities in our age of electronic communication.

[251] This registry can be accessed on-line: <http://www.groups.yahoo.com/group/DonorSiblingRegistry/> (date accessed 01 August 2003).

Chapter 7 - Effects of Recommendations

The effects of establishing an identity-release system in Canada would reach beyond the donor offspring and would have an impact on recipients as well. This would be particularly so if the legislation would include the obligation on recipients to tell their children that they are donor offspring. At this point, the rights of donor offspring to know their genetic identities may conflict with the recipients' perceived rights to reproductive freedom, and, specifically, to determine how they want to raise their children.

I. Recipient vs. Offspring Rights

Absent the recipient's right to reproduce, the donor offspring would not be conceived. Thus, society generally believes that all adults have the "right" to reproduce. Some have argued that requiring recipients to tell their children that they were conceived by a donor constrains this reproductive freedom. This argument takes form in two ways. The first is that abolishing donor anonymity will lead to a reduction in donor numbers and that the reduced selection, or access to the services, constrains the reproductive rights of potential recipients. The second is that parents have the right to raise their children as they see fit which includes participating in an anonymous donor system.

A. Right of Recipients to Access Services – Factual Situation in Canada

Some people fear that an identity-release system will lead to a donor shortage. The anticipated donor shortage would serve to reduce the amount of donated material available, and hence, would limit the number of potential recipients who could participate in donor conception. Such a shortage would also decrease the recipients' choice of the kind of donor they want to use.

Before the legal analysis of these claims is carried out, some factual background must be brought to the fore. The most important point to keep in mind is that the link between anonymity and donor numbers has not been proven. The experiences of systems like that in Sweden and sperm banks where identifiable donors are offered illustrate that donor numbers do not suffer without anonymity guarantees.[252] More timely, for potential Canadian recipients, is the fact that there is a current shortage of sperm donors in Canada due to the effects of the Health Canada guidelines.[253] In this situation, if potential recipients cannot have access to the kind of donor that they want, they typically import the chosen material from the United States. To date, no potential recipients have brought forward claims that their reproductive rights are being unfairly constrained by the donor shortage caused by the guidelines. The irony of arguments linking identity-release to donor shortages is seen in this situation when it seems that it is not the actual donor shortage that is a concern, but rather the reason for the shortage itself.

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[252] J.Scheib, M. Riordan & S. Rubin, "Choosing identity-release sperm donors: the parents' perspective 13-18 years later" (2003) 18:5 Human Reproduction 1115; *Supra* note 78 at 232; *supra* note 76.

[253] *Supra* note 15.

B. Legal Analysis of Rights of Recipients to Access Services or a Wide variety of Donors

Canadian law has no quick answer as to how to balance the rights of children against the rights of their parents to reproduce when these rights conflict. In contrast, the question of balancing these two important sets of rights has been addressed in the Australian State of Victoria's *Infertility Treatment Act*.[254] That Act establishes four guiding principles:

> (a) the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount;
> (b) human life should be preserved and protected;
> (c) the interests of the family should be considered;
> (d) infertile couples should be assisted in fulfilling their desire to have children.[255]

The Victorian Act differs from Bill C-13 in that it specifically refers to the interests of families and the goal of infertility treatment. The more striking difference between the two, however, is that the *Infertility Treatment Act* specifically ranks these principles in order of importance by stating that "these principles are listed in descending order of importance and must be applied in that order."[256] Thus, the welfare of children born through the procedures must, legally, be put ahead of assistance to infertile couples in having children.

Bill C-13 does not rank its principles. It also does not include assisting infertile couples with having children as one of its principles. One must be cautious in drawing conclusions about the absence of such a principle in Bill C-13. It is not necessarily so that Bill C-13 does not consider the treatment of infertility as an important principle. The Bill's principles sound more like factual

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[254] *Supra* note 201 at s. 5.
[255] *Supra* note 201 at s. 5(1).
[256] *Supra* note 201 at s. 5(2).

statements than legal principles. For example, Bill C-13 recognises as one of its principles that "while all persons are affected by these technologies, women more than men are directly and significantly affected by their application."[257] Thus the declaration of Bill C-13's principles does not seem to serve the same purpose as that of the principles in the *Infertility Treatment Act*.[258] Without such specific guidance within Bill C-13, the answer of how to balance the rights of offspring and the rights of parents is more elusive.

The argument that recipients have the right to access the kind of service with the kind of donor that they choose is an assertion of a positive right. That is, couples who want to use donor-assisted conception techniques argue that they have the right to use an unknown donor or to have a wide variety of donors to choose from.

In Canada, there currently is no legal right, as a positive right, to reproduce. The limited case law on this issue has indicated that Canada does not consider that there is a right to access assisted reproductive technologies.[259] The seminal Canadian case on this point, *Cameron* was framed in the context of "access" as being equivalent to "publicly funded." The case can therefore be read to suggest that if there were no financial limits, funding for assisted human reproduction services might be provided. The case was not about whether or not a particular service should be available at all.

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[257] *Supra* note 1 at s. 2(c).
[258] *Supra* note 201 at s. 5.
[259] *Cameron* v. *Nova Scotia (Attorney General)*, [1999] S.C.C.A. No. 531; ref'g leave to appeal. (1999) 177 D.L.R. (4th) 611 (C.A.); (1999) 172 N.S.R.(2d) 227 (S.C.).

Absent a specific law that declares a right for people to be able to reproduce using the means of their choice, it cannot be concluded that there is a right to access the kind of donor system that one prefers. As reproductive choices increase with medical technology, this question will have to be squarely addressed by legislatures and courts.

C. Legal Right to Family Choices

Although there is no positive legal right to reproduce, there is a negative right to be free from state interference, meaning that consenting adults are free to attempt to reproduce. The absence of laws restricting a person's right to attempt to reproduce have generally been thought to include the right to make choices within one's family sphere. The family realm is seen as a private area of one's life that should be free from state interference.

It is not only in Canada that people believe that the state ought not to interfere with their family decisions. One Swedish couple, who traveled to Denmark to make use of Denmark's anonymous donor system, say that "we only want there to be one father and not two possible fathers, that's why we chose to go to Denmark."[260] This illustrates the nature of the right claimed by recipients, as they feel entitled to use a technology in their chosen manner, rather than as it is available to them.

Although Canadians feel strongly that the state ought not to interfere with their family lives, we also feel strongly that certain kinds of behaviour ought to be

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[260] M. Hill, "Sperm donors 'want to keep anonymity'" *BBC News World Edition (Health)* at 3 (15 October 2002), on-line: < http://news.bbc.co.uk/2/hi/health/2329675.stm > (date accessed: 01 August 2003).

restricted, even if they occur within the family realm. That is, people are free to raise their children as they see fit, as long as those choices fit within the parameters of what the government and society deem to be choices that foster the well-being of the child. The rights of parents to make choices about how to raise their children are therefore limited by the state's determination of what is in the best interests of the child. If, for example, parents decide that spanking is an appropriate method of discipline for their children, the government may limit the parents' rights to raise their children.

Outside of the context of child abuse, courts also pay close attention to the best interests of the child in custody and access issues. The focus on what is in the child's best interests, as a legal tool, indicates the point at which the rights of parents to choose how to raise their children conflict with state-imposed restrictions based on the well-being of the children. Such safeguards are necessary because children are seen to be in a vulnerable situation, utterly dependent upon their parents for survival. Additionally, parents have a fiduciary duty to make decisions in the child's best interests. Thus, although there is a negative right to raise one's children as one sees fit, there are positive obligations to make choices with the best interests of the child in mind.

An illustration of how these rights and obligations intersect is seen in the child access case, *Johnson-Steeves* v. *Lee*.[261] The appellant mother argued that she had a right to choose a family model that excluded the biological father of her child. Ms. Johnson-Steeves felt that section 7 of the *Canadian Charter of Rights*

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[261] *Johnson-Steeves* v. *Lee*, [1997] A.J. No. 1057 (C.A.) (Q.L.), aff'g; [1997] A.J. No. 512 (Q.B. (Q.L.).

and Freedoms[262] protected her right "to decide what type of family she would create in which to raise her child."[263] The Court rejected the existence of this right in general, and specifically in instances when the family model chosen by a parent is contrary to the best interests of the child. In the trial decision, Kenny, J. condemned Ms. Johnson-Steeves for focusing on her own desires and freedoms rather than considering what would be best for her son. Kenny, J. further stated that:

> Ms. Johnson-Steeves' interest in arranging her world as she would like to see it does not mean that it is also in Nigel's best interest. Nigel knows or will come to know that he has a father and mother as all children do. It is Nigel's right of access to his father and not his mother's right to bargain away. At this stage, it does not matter to Nigel whether he was conceived by artificial insemination, during a one night stand, or during a long term relationship or marriage. What he does know is that he has a father and a mother.[264]

The above pronouncement was not made within the context of a donor conception but does illustrate the way that a court will deal with claims to make reproductive choices that will influence the well-being of the child. There is no Charter right to make a decision about the way one would like to structure his or her family, and this is even clearer if that choice will impede the well-being of the child. Thus it can be safely said that a recipient's claim of a right to reproductive freedom that would include the ability to make decisions which are not in accordance with the well-being of their children cannot be upheld in Canadian law.

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[262] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[263] *Johnson-Steeves* (C.A.) *supra* note 261 at para. 19.
[264] *Johnson-Steeves* (Q.B.) *supra* note 261 at para. 54.

The interplay between the freedom of an individual to procreate and the consequent responsibilities as a parent to the child illustrates the need for the prioritization of the well-being of children in reproductive technology laws. Individuals who are choosing to conceive a child cannot, at the same time, make decisions that are contrary to the child's welfare and uphold his or her fiduciary duty to the child. It is absurd that the welfare of the child can be removed from the decision of how to procreate. Despite the fact that the child does not yet exist, we know that "[c]hildren who will actually exist in the future will have interests then and we can foresee that our current choices and actions could cause harm which would be felt at that time."[265] As applied to the current debate, the obligation on parents to make decisions that will necessarily effect their children's well-being, when their children come to exist as children, is part of the parental fiduciary duty to the child. If it is known that concealing the use of a donor or concealing the donor's identity is harmful on the child or offspring's well-being, then there is a consequent duty on parents to ensure that they avoid these two scenarios. Therefore, a recipient withholding information about the nature of a child's conception is not protected by any legal claim of a right to reproductive freedom.

D. Conclusion of Effects on Recipients

The one important question that must be asked is for whose benefit the secret is being kept? Some recipients who choose not to tell their children that they are donor offspring nonetheless choose to tell other people. This suggests a number

[265] L. Shanner, "The Right to Procreate: When Rights Claims Have Gone Wrong" (1995) 40 McGill L.J. 823 at 845.

of things, including that the parents feel that the child is better off not knowing this information. This perspective may be changed by more information coming to the foreground on the impacts of secrecy on donor offspring. It also suggests that the recipients see it as information about themselves rather than information about their child. Recipients who feel this way would then have a sense of entitlement to choose what to do with the information, who to tell and who not to tell. It might be difficult for people with that opinion to see the information as something that their child feels an entitlement to, despite the fact that donor offspring are very clear that they feel this is the case.

Reproductive freedom does not extend so far as to deny the child, who is the subject of the reproduction itself, his or her own rights to well-being. With any right comes a responsibility. The "right" to be a parent brings perhaps the greatest responsibilities imaginable. It is the model of the responsibilities of the parent to the child that provides the foundation for the legal notion of a fiduciary duty. Therefore, to speak about the right to reproduce as broadly as it has been used in the debate over donor anonymity presupposes that the parental rights will not conflict with their duties to act with the best interests of their child in mind. In fact this is not the case. The rights of donor offspring to know their genetic identities form a significant part of their well-being. As such, recipient parents acting in their children's best interests would inform their children that they are donor offspring.

II. Implications of Right to Know Genetic Heritage in Other Situations

If Canada entrenches a right for donor offspring to know their genetic heritage, there may be legal implications in other contexts. For example, people who are adopted may also want to have the same right legally acknowledged. There may even be individuals who are neither adopted nor conceived through a donor but who do not know one of their biological parents. These individuals may also want the right to know their genetic identities.

Based on the principles of privacy that support the right of donor offspring to know their genetic identities, members of these other groups might also be entitled to the same rights. If our genetic identities are essential parts of ourselves, physically and psychologically, and are within the realm of our fundamental rights of privacy, then the right should be universal. Legally no such universal right has been declared, although cases like *Gaskin*[266] hint that this might soon change.

Ideally, then a universal right to know one's own genetic identity would be established. Realistically, the nature of natural conception is such that a person's father may not be known. Unlike in donor conception, there is no record kept of the biological father. According to Bill C-13 the information sought by donor offspring will be maintained in a government registry. Thus, donor offspring are not seeking information that is not available, but rather are asking that they be given access to information that already exists, but is being concealed from them.

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[266] *Supra* note 182.

The sought-after information is available precisely because of the nature of donor-assisted conception. The donor, even if his or her identity is concealed, is chosen by the recipient only for his or her genetic contribution. The conception is not only planned, but deliberate steps are undertaken in order to make the conception occur. In this context, recipient parents may differ somewhat from other parents. Recipients have a far greater degree of control over the conception of their child. This is not to say that recipients can determine when they will conceive, given that the success rates of donor-assisted conception vary. Nonetheless, when and if conception happens for recipients, it has been planned.

The planning and deliberation of donor offspring does not, in itself, mean that they should have a right to know their genetic identities when other individuals do not. It does mean that there very easily could, and certainly should, be records about the details of their conception that will not exist in almost any other type of conception. Thus donor offspring do not have a greater right to know their genetic identities, but do have a greater ability to obtain this information.

The problems with tailoring donor legislation to outdated adoption laws also arise in the context of a universal right to know your genetic identity. While it would be ideal, and appropriate, for the government to implement legislation recognising a universal right to know one's genetic heritage, the absence of such legislation is no reason to fail to acknowledge the right in legislation that is currently being drafted. Canada not only has the opportunity to acknowledge this right for donor offspring in legislation, but must choose to acknowledge that right

or create a new right. There is no similar choice that needs to be made by the government in terms of the recognition of the universal form of the same right.

Donor conception may pave the way for the eventual acceptance of a universal right to know the identity of one's genetic parents. The deliberate nature of donor conception might make it easier for the right to be accepted and legislated. Other legislative change might follow as society begins to think about issues like this that have not yet been at the forefront of public consciousness.

Chapter 8 – CONCLUSION

When any new technology is first being used, it is understandable that we will know little about the effects that it will have on the population. After that technology has been used for a generation or two, however, we can see its effects and should ensure that the applicable legislation encompasses the essence of an appropriate law. That is, the law should protect the most fundamental rights and the rights of those who are most vulnerable.

New reproductive technologies bring the promise of increasing options for exercising our reproductive freedom. For couples or individuals who would otherwise be unable to conceive, technologies that utilise donor gametes or embryos have allowed for alternatives to adoption. The desire to have a child that is at least partially "biologically one's own" has in a large part propelled the demand for donor conception. The primal urge that motivates parents to want children who share their genes is the same kind of urge that donor offspring feel to seek the identity of their donors. Because of the essential similarity between these two drives, we must seriously question the reasons why one of those rights is being compromised by the proposed Bill C-13.

One of the principles of Bill C-13 is that the "health and well-being of children born through the application of these technologies must be give priority in all decisions respecting their use."[267] If Canada implements an anonymous

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[267] *Supra* note 1 at s. 2(b).

donor system, the result will be a violation of the most fundamental rights of donor offspring as a trade-off for the establishment of a new legal right of donor anonymity. This new right would then have to be respected once created, thereby leading to the perpetuation of a system established on insecure ground. Choosing to create a new legal right over protecting the most vulnerable and basic rights is inconsistent with fundamental Canadian laws and legal principles. Donor anonymity can only be established if we turn a blind eye to the fundamental privacy rights of donor offspring. While technology can provide great benefits to society, those benefits ought not to come at the sacrifice of the primary rights of a vulnerable group of Canadians.

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